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Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT C. KONOP,

Petitioner,

v.

HAWAIIAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner

With a *Dissent*, the Court of Appeals reversed a U.S. District Court *Order to Vacate* an arbitration award which had wrongly upheld Hawaiian Airlines' termination of Boeing 767 Captain Robert Konop. Captain Konop was fired for claimed "disloyalty" when he led employee opposition to the ratification of a concessionary labor contract. Based on the record, the District Court found that the arbitrator exceeded his defined jurisdiction when he considered and relied on "matters" which had not first been handled as contractually mandated. The *plain language* of the labor agreement ("CBA") required both a "precise" pre-termination "Statement of Charges" and a pre-discharge *company hearing* on those charges.

Questions Presented for Review

1. Regardless of the arbitrator's professional censure for misconduct, in behalf of Hawaiian Airlines, did the Court of Appeals create a conflict between the circuits, and with the law, when it reversed the district court's *Order to Vacate* the arbitration award as was issued contrary to the *plain language* limits for jurisdiction specified in the labor contract?

2. Has the Court of Appeals misconstrued, or misapplied, the Supreme Court's directions in *Machinists v. Central Airlines*, 372 U.S. 682 (1963), so as to mistakenly undermine the important public policies respecting airline arbitrations under the *Railway Labor Act*?

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OPINIONS AND JUDGMENT BELOW

The U.S. District Court's *Order to Vacate* is unpublished, and it is provided here in the Appendix ("App.") at pp. 8a-39a. The *Memorandum Decision* of the Court of Appeals, reversing the District Court's *Order*, and including the *Dissent* of Judge Callahan, is also unpublished and reprinted here at App. pp. 1a-7a. The *Award* of the Hawaiian System Board, the basis for this case, is provided at App. pp. 40a-45a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction to hear and act on Captain Robert Konop's *Petition to Vacate* under the terms of 28 U.S.C. §§ 1331 and 1337. The Court of Appeals issued its *Memorandum Decision*, with the *Dissent*, on June 30, 2009 (App. pages 1a-7a). The Court of Appeals denied Captain Konop's timely *Petition for Rehearing* on September 11, 2009 (App. at pages 46a-47a). Thus, this *Petition* has been timely filed in line with Supreme Court Rule 13(1), and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subject to specified limitations, *Title I* of the *Railway Labor Act* ("RLA") (45 U.S.C. §§ 151 et seq.), confers upon the *National Railway Adjustment Board* ("NRAB") the power to hear and to decide labor disputes which arise with respect to the application or interpretation of labor agreements in the Railroad Industry. The provisions of *RLA* Title I, however, also provide an "analogous" framework for other

arbitrations, and specifies a process for court review of arbitration cases in the airline industry, as take place under the requirements of *RLA* Title II. See: *International Association of Machinists v. Central Airlines*, 372 U.S. 682 (1963).

The relevant provisions of *Title I* and *Title II* of the *Railway Labor Act* (45 U.S.C. §§ 151 et seq.) are reprinted in the *Appendix* (App. pages 48a-52a). Included therein, as apply here for review, is 45 U.S.C. §§ 153(i); 153(p); 153(q); 181, and; 184.

STATEMENT OF THE CASE

During oral argument before the Court of Appeals, Judge Consuelo Callahan chastised Hawaiian Airlines, and its legal counsel, for their "appalling behavior." This condemnation apparently arose with respect to Hawaiian's efforts to interfere in the arbitration review processes, as was wrongly accomplished through the attorneys' solicitation of ethical breaches from Arbitrator James Scearce. However, the record before the Appeals Court panel also included undisputed evidence of Hawaiian's longer history of anti-labor misconduct, and its criminal violations of electronic privacy laws, all undertaken in the airlines' wrongful pursuit of collective bargaining advantages over its employees. See: *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), cert. denied; 537 U.S. 1193 (2003).

Regardless of the reasons for Judge Callahan's concern, Hawaiian's counsel simply called Arbitrator

James Scearce's formal *Censure*, by the National Academy of Arbitrators ("NAA") (App. pp. 61a-65a), "a tempest in a teacup." This remark was given after Hawaiian attorney Mark Perry attempted to orally downplay Mr. Scearce's misconduct, portraying the arbitrator's professional censure as the *least possible* sanction which might have been imposed. (See also: Page 5 of Hawaiian's 4/28/2009 *Response* to Captain Konop's *Request for Judicial Notice*).

In the NAA's evaluation of the arbitrator's misconduct, however, Arbitrator Scearce was formally disciplined for his "serious and inexcusable" violations of the NAA's *Code of Professional Responsibility*. Mr. Scearce was also denounced by the NAA for his "inexcusable violation of fundamental fairness," and for his "insensitivity to the requirements of ordinary due process." (App. pp. 63a-65a). All of this, however, is merely the immediate backdrop against which this *Petition* arises. These are not the issues brought for review.

Introduction

When the district court issued its *Order to Vacate* the arbitration award, which had wrongly sustained the employment termination of widebody jet Captain Robert Konop, the court relied on the *plain language* jurisdictional limitations provided within the *Hawaiian Airlines 2005 Pilots Agreement* (App. pages 53a-56a). That collective bargaining agreement ("CBA") required that, prior to any action for discipline or discharge, Hawaiian Airlines was to

provide the accused pilot with a statement of the "precise charge or charges" which he would face. App. page 53a. In fact, in the record before the district court, Hawaiian Airlines had provided Captain Konop with a *Statement of Charges* ("SOC") (App. pages 14a-17a). The CBA, however, also required a company hearing and a written decision on the "precise charge or charges," before action on employment discharge could be attempted. App. 53a.

Unfortunately, at the arbitration hearing with respect to Captain Konop's termination, where Konop could disprove the company's original allegations, Hawaiian instead focused on entirely new charges. Those new charges had not been subject to a prior *Statement of Charges*, had not been provided the required company hearing, and had not been included as a part of the required company written decision in the matter. Under such circumstances the *Hawaiian Airlines 2005 Pilots Agreement* ("CBA") prohibited the Hawaiian System Board of Adjustment from undertaking any review or consideration of those new "matters." Thus, as both the *Dissent* and the district court noted, the arbitrator exceeded his authority when he considered and relied on new allegations, which had only first arisen at the arbitration hearing. The plain language of the CBA provided:

> **"No matter shall be considered by the Board that has not first been handled in accordance with the provisions of Section 16 (Grievances) and a decision thereon by the Company."**

App. p. 56a; *CBA* Section 17(D)(2)

Both the district court, and the *Dissent*, correctly concluded that no interpretation of the collective bargaining agreement was necessary in order to conclude, from its *plain language,* that the arbitrator exceeded the scope of his contractually limited authority. The arbitrator improperly sustained Captain Konop's termination on the basis of entirely new charges, which had neither been provided in writing prior to Captain Konop's termination, nor been a part of the prior company *investigative hearing*, which was also a jurisdictional prerequisite (App. pp 53a & 56a). This petition, thus, arises where the Court of Appeals erroneously further limited its review beyond those already extremely limited circumstances provided by statute, and contrary to the standards applied by most other circuits.

In fact, the CBA contained a *default remedy* in the event Hawaiian failed to timely provide its charges, failed to conduct the required investigative hearing, or failed to timely provide a written decision with respect to allegations which were ultimately pursued. That jurisdictional *default* required, as now applies here, that the "grievant's position shall be sustained, and the relief requested shall be granted." App. page 54a. In this case, the "relief requested" was Captain Konop's reinstatement. App. p. 59a.

Background

Immediately after Hawaiian Airlines' pilots voted to reject the ratification of a concessionary labor

contract, in March of 2005, the airline fired Captain Robert Konop. Captain Konop was a 20 year veteran Boeing 767 pilot for Hawaiian, with an unblemished safety and disciplinary record. It was undisputed, however, that Captain Konop was also a vocal leader in opposition to pilot contract concessions, and that Hawaiian blamed him for a pilot vote, just a few days earlier, to reject a new concessionary labor contract.

At the time of Captain Konop's job termination, Hawaiian was demanding a new round of concessions from its pilots in anticipation of an ownership change. This was taking place just as the airline was experiencing the most profitable period in its 80 year history. In fact, the airlines' huge operating profits had come in spite of a bankruptcy filing, and it was a period during which the airline had accumulated more cash from those profitable operations than at any other time, When he was discharged, Hawaiian charged that Captain Konop had been "disloyal," that he had "failed to work with management," and the airline further asserted that Hawaiian's pilots had voted to reject the ratification of concessions based on Captain Konop's claimed "misrepresentations."

Concurrently, in a related *Motion for Contempt* in the bankruptcy court in Honolulu, the airline separately accused Captain Konop of *'interference with negotiations'* and of *'interference with the contract ratification process.'* Hawaiian there alleged that pilots voted to reject ratification on the basis of "Konop rhetoric." Hawaiian also asserted that Captain Konop was guilty of "misrepresentation"

where he had stated his belief that an employee-sponsored, alternative bankruptcy reorganization plan was a viable option for Hawaiian. This plan was brought as an alternative to a bankruptcy trustee's proposal, which otherwise resulted in an over $40 million windfall to Hawaiian's former Chairman of the Board, while effectively absolving that former chairman, and his business partner, of liability for a stock buyback scam which improperly netted the pair approximately $18 million more.[1] Where the bankruptcy trustee's *Plan* ultimately prevailed, and when Hawaiian eventually gained the concessions that they sought from its pilots, after Captain Konop's discharge, that court appointee then applied for an $8 million "success fee," and a total 2 year compensation package of approximately $10 million for his relatively minimal time at Hawaiian.[2]

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[1] Hawaiian's Board Chairman and CEO later entered into a 'disgorgement' agreement with the U.S. S.E.C. requiring the return of nearly $2.5 million to minority shareholders. They admitted that key company stock information had been intentionally misstated. S.E.C. File No. 3-11676, *Order* 59870, dated May 6, 2009.

[2] Through its bankruptcy, Hawaiian was able to avoid scrutiny of the fact that its former CEO had converted nearly $25 million of Hawaiian's federal 9/11 impact grant money to a fund which was wrongly used to buy back Hawaiian's stock from the CEO and his partner. Hawaiian also avoided nearly $100 million in interest and penalties for the airlines' failure to pay federal fuel excise taxes, public money which was fraudulently used to bolster Hawaiian's balance sheet for the purposes of justifying the company stock buyback swindle, this just before the bankruptcy.

The matter of Captain Konop's termination was then "grieved," and taken to the Hawaiian System Board of Adjustment. There, the case was heard by a three member panel, as chaired by arbitrator James Scearce. During four days of hearings before the System Board, and in spite of objections by the Air Line Pilots' Association, the arbitrator allowed Hawaiian to raise *new charges,* without any prior notice, without a prior company hearing, and without the required company written decision with respect to those new charges. Hawaiian, in fact, provided scant evidence to support its original charges, other than with respect to assertions the Captain Konop had made objections to proposed expenditures, which required bankruptcy court approval, objections that the bankruptcy court had overruled.[3] Hawaiian also provided evidence that Captain Konop's concerted opposition had influenced the pilot vote to reject the ratification of the proposed new contract.

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[3] These objections first arose to oppose Hawaiian's claimed justification for seeking court approval to suspend payments into the pilots' retirement fund. During the 18 months over which Captain Konop had filed his objections, Hawaiian never provided any warning or indication that it might consider such objections a violation of company "House Rules," as was later claimed at the arbitration. Objections were also filed for proposed extraordinary expenditures, which had been requested regardless of the airlines' failure to fund the pilots retirement plan. These proposals included plans for a new Honolulu airport terminal, for which the initial planning *'consultations'* alone were estimated to cost several million dollars. However, no new terminal was never built.

After the case was submitted, the arbitrator held Captain Konop culpable for the previously uncharged allegation of having made "false or unproven" statements, rather than the company's prior "precise charges," or the conclusions made in line with the airlines' contractually required written decision.[4] That company written decision asserted Captain Konop to be guilty of "intentional misstatements and acts of dishonesty." The arbitrator also referenced his consideration and reliance on what he termed "a serious error," by Captain Konop, with regard to a claimed shortfall in "due diligence" concerning the employee alternative plan of reorganization for Hawaiian.

At the same time, where Hawaiian had "precisely" asserted that Captain Konop was guilty of false representations, made with respect to a posting on the employee website which Konop owned, the arbitrator instead concluded Captain Konop to be *liable* for any mistaken information appearing on the website. It was undisputed before the System Board that Captain Konop had not made a posting which Hawaiian had cited in its *Statement of Charges*. In this regard, the arbitrator failed to reference or to

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[4] At that hearing, Hawaiian simply referenced the first bankruptcy objection Captain Konop filed, opposing Hawaiian's effort to avoid a $500,000 retirement fund payment. For 18 months, Hawaiian failed to provide any warning or notice that it considered this earlier objection a violation of any company "rule." The issue only first arose five (5) days after pilots voted to reject the ratification of a new concessionary labor contract.

apply the *plain language* provisions of the *Hawaiian Pilots Agreement*, the airlines' written charges, or the well established industrial Common Law with respect to "Just Cause" for employment termination. (App. 66a-76a; *The Test of Just Cause*).

The District Court Proceedings

After the Hawaiian System Board of Adjustment issued its undated arbitration award, on or about April 7, 2006, on July 14, 2006 Captain Konop filed a *Petition for Review and to Vacate* that award in the U.S. District Court for the Central District of California (Case No. 06-04426-CBM) (18 USC § 1337). An extensive *Excerpts of Record*, of the underlying arbitration proceeding, was also filed and served at that time. Thereafter, on August 21, 2006, Hawaiian Airlines filed its *Opposition* to the *Petition*. Concurrently, Captain Konop filed a *Motion for Summary Judgment*, again opposed by Hawaiian. The *Petition to Vacate* was thereafter taken under submission on the record, without oral argument.

On January 4, 2008, the U.S. District Court issued its *Order to Vacate* the arbitration award, as had wrongly sustained Captain Konop's discharge. Based upon the *plain language* of the applicable labor contract, the district court concluded that the arbitrator exceeded the scope of his authority where his decision was predicated on new allegations which had "not first been handled in accordance with the provisions of the Section 16' of the CBA." The district court's *Order to Vacate* was correctly predicated on the

plain language requirement that there first be a company hearing and written decision on any "charge or charges," rather than allowing them to be raised for the first time at the later arbitration hearing. Hawaiian appealed that court *Order*.

Proceedings In The Court of Appeals

On June 30, 2009, with a *Dissent* from Judge Consuelo Callahan, the U.S. Court of Appeals for the Ninth Circuit issued a *Memorandum* which granted Hawaiian Airlines' appeal of the district court's *Order to Vacate*. Jurisdiction was under 18 USC §§ 1337. In the 2-1 majority decision, the Appeals Court opined that, in order to determine whether the arbitrator had violated the scope of his jurisdiction, the district court was required to "interpret" the Collective Bargaining Agreement, concerning what the CBA required that Captain Konop was to be timely provided with regard to the written statement of "the precise charge or charges" he faced. There was no dispute that, before being brought into a prerequisite company investigative hearing, and prior to a required company written decision in the case, a written company Statement of Charges ("SOC") was to be provided, and that certain time limits had been specified for each of these procedural steps.

The full appeals court panel, however, agreed to deny Captain Konop's cross-appeal of the fact that the district court's *Order to Vacate* had mistakenly been too narrow. Therein, Captain Konop noted that the arbitration award should also have been vacated

where it was issued in "manifest disregard of the law," and where it showed that the arbitrator had wrongly "dispensed his own brand of industrial justice." Captain Konop further noted that the issue of "fraud and corruption" in the case, as would also justify vacatur, had only first become evident after the district court issued its *Order to Vacate*.

In contrast to the majority view, Judge Callahan's *Dissent* concluded that the arbitrator had exceeded his jurisdiction when he considered and relied on "matters" which had not first been provided in the SOC, nor been subjected to the required company hearing and written decision. In fact, the company written decision had also been "precise," but did not include "matters" upon which the district court concluded that the arbitrator had considered and relied. The *Dissent*, however, did not detail how this particular shortfall also adversely impacted the contract's *plain language* requirement for a company hearing on the charges, or the mandate that there also be a written company decision on their "precise" charges. In fact, neither the majority opinion, nor the *Dissent*, discussed the fact that Hawaiian had provided a precise Statement of Charges, and a written decision, which were effectively abandoned at the arbitration hearing.

In a 2-1 vote, on September 11, 2009, the Appeals Court panel denied Captain Konop's *Petition for Panel Rehearing*. Further, no judge of the court requested a vote concerning the concurrent *Petition for a Rehearing En Banc*.

REASONS FOR GRANTING THE PETITION

The Appeals Court majority created a conflict in how the various circuits now view the issue of arbitral jurisdiction. Though rare, the lack jurisdiction has been the most common basis for courts to vacate arbitration awards. At the same time, there is still no circumstance in which an arbitrator is allowed to simply "dispense his own brand of industrial justice." Thus, in this case, it was not necessary for the district court to consider the arbitrator's ethical violations to conclude that the arbitrator had breached the limits of his authority. This violation took place when the arbitrator's actions were contrary to the *plain language* limits of the contract (App. pp 53a & 56a), lacked justification in industrial common law (App. pp. 66a-76a), and when the arbitrator did not undertake any query into the *intent* of the parties with regard to the allowable *due process* limits of "Just Cause" for a pilot's job termination.

I. The Review of Jurisdictional Breaches by Arbitrators is Within the Proper Purview of the Courts:

In reversing the district court's *Order to Vacate*, the appeals court majority ignored the requirement that an arbitrator must operate within the *plain language* limits of his jurisdiction. In taking its action the appeals majority, first, mistakenly assumed an *ambiguity* in the CBA's requirement for a "precise statement of the charge or charges" against Captain Konop. Second, the panel majority wrongly

surmised that the word "precise" might be viewed differently in the context of the labor agreement than in the real world, rather than to apply it as Hawaiian itself had done, providing Captain Konop with a "precise" pre-discharge statement of charges, then a written company decision on those charges. (Hawaiian, however, later effectively abandoned those charges at the arbitration hearing.) Third, the appeals majority created a conflict with the law, and with the other circuits, when the arbitration award did not comply with the clear limits of the arbitrator's jurisdiction, and did not draw "its essence from the collective bargaining agreement."

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; **he does not sit to dispense his own brand of industrial justice**. He may of course look for guidance from many sources, yet **his award is legitimate only so long as it draws its essence from the collective bargaining agreement.**"

United Steelworkers of America v. Enterprise Wheel & Car Corp, 363 U.S. 593, 597 (1960) (emphasis added)

The only issue submitted for the arbitrator's review was whether or not Hawaiian's stated charges demonstrated "Just Cause" to terminate Captain Robert Konop on the basis of his lawful conduct off the job and away from the workplace. The grievance was brought to the Hawaiian System Board based on: 1) Hawaiian's precise *Statement of Charges*

against Captain Konop; 2) in light of the completion of the required company hearing on those charges, and; 3) in opposition to the written decision on the precise charges which Hawaiian described and enumerated, as contractually required, shortly after the completion of the company hearing. App. p. 57a-59a.[5]

Over multiple objections, however, at the hearing before Arbitrator James Scearce and the Hawaiian System Board, the arbitrator allowed Hawaiian to raise entirely new allegations against Captain Konop. The contract prohibited any such expansion of charges under several *plain language* provisions. The long established requirements of labor common law also unequivocally mandated the reversal of any company discharge under the circumstances present in this case. App pp. 66a-76a.[6]

In fact, as the district court noted, and as the

[5] Hawaiian did not object to, supplement, or disagree with this case submission to the System Board.

[6] The "Seven Tests," developed by arbitrator Carrol R. Daugherty, is the most common reference in the *industrial common law* for termination "just cause." It has been adopted by the National Academy of Arbitrators, the American Arbitration Association, and the American Bar Association. App. pp. 68a-76a (See: *Enterprise Wire Co.*, 46 LA 359, Daugherty (1966); *Moore's Seafood Products, Inc.*, 50 LA 83, Daugherty (1968)). A "no" answer to any one of the seven provided questions signifies that "just cause" for a termination did **not** exist. In this case, all of the seven questions had a "NO" answer. See Also: *Just Cause: The Seven Tests*, Koven and Smith, Third Edition, BNA Books, 2006.

Dissent agreed, in reaching the decision to sustain Hawaiian's termination, the arbitrator considered and relied on matters which had not been a part of Hawaiian's SOC, and had not been subject to a company hearing. Thus, those new charges were also NOT a part of Hawaiian's required written decision in the matter, and the arbitrator ignored the limits of his authority. In fact, under these circumstances, the jurisdictional *default* in the CBA required that Captain Konop's "position shall be sustained, and the relief requested shall be granted." App. p. 54a.

Hawaiian's written decision had *precisely* ruled that Captain Konop was guilty of "numerous falsifications and acts of dishonesty." (*Excerpts of Record*, Tab 27)[7] The arbitrator, however, simply ignored these assertions, and this justification for termination, when the charges could not be proven by Hawaiian at the hearing. As the district court noted, the arbitrator then considered and relied on "matters" which were not properly before the System Board, where they were not in either the SOC or in Hawaiian's own written decision, and they had not been submitted for review. App. p. 55a. The district court noted that the CBA was unambiguous:

> **"No matter shall be considered by the Board that has not first been handled in accordance with the provisions of**

[7] These materials were supplied to the Court of Appeals as a part of the required *Excerpts of Record*, as had been in the record presented to the district court as part of the original *Petition to Vacate*.

Section 16 (Grievances) and a decision thereon by the Company."

App. p. 56a; *CBA* Section 17(D)(2)

The appeals panel majority, instead, mistakenly focused on the fact that the arbitrator had failed to act on the basis of the "precise charge or charges" which were before him. The majority reversed the district court reasoning that use of the word "precise" was imprecise, while that word might also be *'interpreted'* as requiring something different than the actual "precise" written statement of charges which Hawaiian had originally provided, as was the airlines' apparent understanding of the CBA and the "intent of the parties." However, the arbitration award never mentioned the "precision" of the charges, any lack thereof, or even hinted that any *definition* played a factor in the arbitrator's considerations.

"[W]here an arbitrator fails to discuss a probative contract term, and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract." *George A. Hormel & Co. v. United Food & Commercial Workers, Local 9,* 879 F.2d 347, 351 (8th Cir.1989). "[A court] may reverse an arbitral decision as in excess of a board's jurisdiction only where the arbitration board's order 'does not draw its essence from the collective bargaining agreement,' " *Norfolk and Western Railway Co. v. Transportation Communications International Union*, 17 F.3d 696,

701 (4th Cir. 1994), quoting; *W.R. Grace v. United Rubber Workers*, 461 U.S. 757, 764 (1983).

It was only the panel majority, however, who somehow discerned *ambiguity* in the contractual use of the word "precise." There was no inquiry, briefing, or evidence offered in this regard at the arbitration or on appeal. In such circumstances, by contrast, the Eighth Circuit requires that, where there is an "ambiguous provision," the arbitrator's failure to seek "the parties' guidance as to its intent" requires vacatur where an award under such circumstances would constitute the arbitrator having "dispensed his own brand of industrial justice, and his award cannot be said to draw its essence from the collective bargaining agreement." *International Woodworkers v. Weyerhaeuser, Co.*, 7 F.3d 133, 136-137 (8th Cir. 1993). "Determining the intent of the parties is the essential inquiry." *CSX Transportation, Inc. v. United Transportation Union*, 29 F.3d 931, 936 (4th Cir. 1994), quoting; *Local 1199, Hospital & Health Care Employees Union, etc. v. Brooks Drug Co.*, 956 F.2d 22, 25 (2nd Cir.1992), and; *Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1279 (11th Cir. 1982).

If an interpretation of the word "precise" had been necessary, as the panel majority discerned, that lack of review also constituted a violation of the arbitrator's authority as defined by the Fourth Circuit. "Where, as here, the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from

the contract." *Clinchfield Coal Co. v. Dist. 28, United Mine Workers,* 720 F.2d 1365, 1369 (4th Cir.1983).

Although an arbitrator's award is due great deference, that respect is not without its limits. "[F]ederal courts have repeatedly vacated arbitral awards that failed to discuss probative terms." *Boise Cascade, Corp. v. Paper Allied-Industrial, Chemical and Energy Workers,* 309 F.3d 1075, n. 9 (8th Cir. 2002), referencing; *Champion International Corp. v. United Paperworkers International Union,* 168 F.3d 725, 731 (4th Cir.1999) (An arbitrator's failure to address certain contractual provisions was "evidence of a basic abdication of [his] duty to apply the contract that governs the grievance"). In fact, the Ninth Circuit's majority here has effectively rejected the *Dissent*, and the differing view of the Eighth Circuit. In this regard, conflict now arises where the applicable corollary holds that "[t]he arbitrator did not have the authority to alter the agreement by interpreting unambiguous language in a way contrary to its plain meaning." *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688,* 959 F.2d 1438, 1442 (8th Cir.1992).

If, indeed, a question of the violation arbitral jurisdiction turns on a deferral to an arbitrator's "interpretation" of the word "precise," which definition the *Dissent* found to be unequivocal when read in conjunction with the *plain language* restrictions of the CBA (App. pp. 6a-7a), the Ninth Circuit would now necessarily defer all review of arbitral jurisdiction issues back to the arbitrator himself. This does not

jibe with the requirements of the law, or any meaningful application. In fact, this new deference not only defeats the intent and purposes of the law, regardless of how narrow the scope of court review is allowed, but it is contrary to the views of virtually all of the other circuits, and contrary to the prior directions of the Court. It is for this reason that the Court should exercise its supervisory discretion in this case, to resolve this growing split between the circuits, and to clarify the Court's intentions with regard to any necessary limits for judicial review of jurisdictional violations by arbitrators.

II. *Title II* of the *RLA* Specifically Excepts Air Carriers from the Exceedingly Narrow Scope of Judicial Review Set Forth in *RLA Title I* (45 U.S.C. §§ 153(p) and (q)), Where Airline Arbitrations Are Not Provided the Review and Appeal Mechanisms of the *National Railway Adjustment Board.*

Both the district court and the Court of Appeals rejected review of this arbitration case beyond the issue of *jurisdiction.* The courts paid no attention to the arbitrator's "serious and inexcusable" breach of professional ethics, his "inexcusable violation of fundamental fairness," or Arbitrator Scearce's complete "insensitivity to the requirements of ordinary due process." App. 65a. Although judicial review of arbitration cases is exceptionally narrow, the award in this case should also have been vacated where Hawaiian, and the arbitration panel, failed in

the most basic requirements of ordinary *due process.*

While other circuits recognize a slightly broader scope of judicial review for airline arbitrations, and that a breach of *due process* or *basic fairness* also exceeds an arbitration panel's jurisdiction, judges in the Ninth Circuit are strictly constrained by circuit case law, in airline arbitration cases, to review only on the basis of those specific factors set forth within 45 U.S.C. § 153(p) and (q). *Singer v. Flying Tiger Line*, 652 F.2d 1349, 1355-6 (9th Cir 1981) (Concluding that the standard for judicial review for arbitration decisions, as applicable to the National Railroad Adjustment Board, are also applicable to airlines). App. 12a. This rigid limitation, however, neither reflects *RLA Title II's* specific airline exception, nor is it consistent with several of the other circuits. There is, however, a reason for this conflict.

First, where airline arbitration cases arise under RLA *Title II* (45 U.S.C. § 181 et seq.), the law provides a specific exception to the applicability of the review standards set forth in RLA *Title I*:

> "All of the provisions of subchapter I of this chapter **except section 153 of this title** are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such

carrier or carriers * * *."

45 U.S.C. § 181 (emphasis added). App. p. 51a.

When examined in context, this exception has a clear and specific foundation. Cases arising under the purview of the National Railroad Adjustment Board have at least three, and in some cases more, layers of available review and appeal before they can be brought to the courts. There is no similar review hierarchy for airlines, or for any other industry.

In this regard, the *National Railroad Adjustment Board* is a permanent adjudicative body with a permanent staff. Beyond the system, group, or regional Boards of Adjustment which airlines might form, railroads have the benefit of non-judicial appeal and review through the four permanent Divisions of the NRAB, and even to the full NRAB itself. The issues of "fundamental fairness" and "basic due process" are, thus, already subject to significant scrutiny. At the same time, with all these layers of available review, ethical breaches would be much less likely.

A railroad employee grievance, in contrast to that of an airline employee, has a well established path for review through a number of appeal layers. Depending on a particular agreement, railroads and employees may first proceed to a *System* or *Group Board of Adjustment* (as for this case), then to the *Regional Board of Adjustment*, and/or to one of the permanent *Divisions* of the National Railroad Adjustment Board, then even to the full *National*

Railroad Adjustment Board. As a practical point, "[t]he *NRAB* is essentially an appellate tribunal." *How Arbitration Works*, Elikouri and Elikouri, 6th edition, p. 165, note 105, BNA Books, Washington D.C., 2003. There is no comparable mechanism available to the airline industry.

Thus, where a particular grievance under 45 USC § 153 already has the benefit of a substantial review and appeal mechanism, beyond the designation of a single review panel, or arbitrator, there is little justification for further court review of railroad cases beyond those exceptionally limited circumstances defined for the courts under *RLA* Title I (45 U.S.C. § 153(p) and(q)). In contrast, under the law, airlines are actually treated as is any other party to an arbitration. Court review is narrow, but slightly greater than that which is defined for railroads under *RLA* Title I. However, in this case, even under that most limited scope of review, the district court was compelled to vacate the award of the Hawaiian System Board. Arbitrator Scearce exceeded the scope of his *plain language* authority, going outside the explicit limits of the labor agreement. Nonetheless, a slightly broader scope of review would have provided even more reasons for vacatur. See: App. p. 38a.

Oddly, the reasons underlying the application of the most limited scope of review under RLA § 153, to airlines, first arose from the Eighth Circuit, rather than from this Court's seminal decision in *International Association of Machinists v. North Central Airlines*, 372 U.S. 682 (1963). In referencing

the Court's determination of the intent that "airline system board awards would 'have legal effect, not merely that of private advice,'" in *Hunt v. Northwest Airlines, Inc.*, 600 F.2d 176, 178 (8th Cir. 1979), the Eighth Circuit's panel took a leap of logic. Under the Eighth Circuit's assumptions, not only would airline arbitration awards be subject to court review, as the Court found was the Congressional intent in *Machinists*, supra, but court review for airlines would also be limited to the exceptionally narrow reasons set out in 45 U.S.C. § 153 for railroads, rather than the standard set for arbitration cases in general. *United Paperworkers v. Misco*, supra at 38. This was contrary to the specific statutory exception, and it was without meaningful explanation by the Eighth Circuit beyond referencing *Machinists*, supra.

Thereafter, the Ninth Circuit, and other of the circuits, adopted the Eighth Circuit's conclusion, without examination of the apparent leap of logic contained there, and without examining the statutory exception or the practical reasons for such exception. In fact, while the Ninth Circuit has strictly applied the most limited scope of review for airlines, which the Eighth Circuit first adopted in *Hunt v. Northwest*, supra, the Eighth Circuit, in fact, had actually taken a slightly more relaxed view.

In *Hunt*, the Eighth Circuit instead recognized the existence of a less stringent standard of review for airlines, noting the propriety of vacatur "where there has been a denial of due process 'By some conduct of the * * * Board,'" citing , *Edwards v. St. Louis-San*

Francisco Railroad, 361 F.2d 946, 953 (7th Cir. 1966) (A Board's denial of *due process* provides the courts with authority for the review of an arbitration award, citing; *D'Elia v. New York, New Haven & Hartford R. Co.*, 230 F.Supp. 912 (D. Conn.1964), aff'd 338 F.2d 701 (2nd Cir. 1964); *Hornsby v. Dobard*, 291 F.2d 483 (5th Cir. 1961); *Ellerd v. Southern Pacific Railroad Co.*, 241 F.2d 541 (7th Cir. 1957); *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F.2d 579. (3rd Cir. 1957); *Brotherhood of Railroad Trainmen v. Templeton*, 181 F.2d 527 (8th Cir. 1950), and; *Edwards v. Capital Airlines, Inc.*, 176 F.2d 755 (D.C. Cir. 1949), cert. denied; 338 U.S. 885 (1949)).

By the same token, the Seventh Circuit has also recognized that its review of airline arbitration cases is not strictly limited under the terms 45 U.S.C. § 153(q). In *Pokuta v. Trans World Airlines*, 191 F.3d 834, 839 (7th Cir. 1999), the court noted that, while the review of airline arbitration cases is extremely limited, that court undertakes a slightly broader review, including when an arbitration board denies "due process," as is the situation in the present case.

> "[W]e have recognized a fourth category of objections that supply jurisdiction over the award -- an allegation that a party was denied due process. E.g., *Bates v. Baltimore & Ohio R.R. Co.*, 9 F.3d 29, 31 (7th Cir. 1993); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722 (7th Cir. 1987) (per curiam)."

Id

The Tenth Circuit, however, has taken a position similar to that of the Ninth Circuit in *Singer v. Flying Tiger Line*, supra. The 10th Circuit notes that "statutory restrictions on judicial review of these decisions are to be strictly enforced." *Chernak v. Southwest Airlines*, 778 F.2d 578, 580 (10th Cir. 1985). In fact, the Tenth Circuit even seems to have gone one step further, as the Ninth Circuit majority did in the present case, leaving the *'interpretation'* of jurisdiction solely to the arbitrator, regardless of the *plain language*. However, the Tenth Circuit failed to reconcile its view in this regard with the prior direction of the Court, which would require that federal courts review the issue of jurisdiction, just as even the strictest standard of review under RLA *Title I* directs. In fact, the Tenth Circuit did not acknowledge that the question of arbitral jurisdiction and arbitrability is one which is left to the courts. *A.T.&T. Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 656 (1986).

The Third Circuit has also questioned the strict applicability of 45 U.S.C. § 153 to airlines. Without deciding the issue of the applicable 'Standard of Review,' in *Hart v. Overseas National Airways, Inc.*, the court noted that "there is a serious question as to whether the entire § 153 applies to the airline industry." (541 F.2d 386, 392 n.15 (3rd Cir. 1976)). In fact, under the terms of 45 U.S.C. § 181 it specifically DOES NOT apply. The Third Circuit then went on to note that in *Machinists v. Central Airlines* (supra), the Court had indicated "that the arbitration

provisions of § 153 were nevertheless to be utilized by analogy in airline disputes." *Id* (emphasis added).

Machinists, however, only discussed the propriety of court review of arbitration awards, where the issue there had been a district court's dismissal of an airline arbitration review case for "lack of jurisdiction." Thus, where RLA *Title II* did not specifically provide for court review in airline arbitration cases, in *Machinists* the Court noted that such review was necessary just as it was for railroad cases, whether that necessity arose under the *RLA* itself, or under some more general authority of the federal courts (i.e. 28 U.S.C. § 1337).

In fact, the Third Circuit has long held that in its review of airline arbitration awards, the court would consider "questions of jurisdiction or of the essential fairness of the administrative proceeding" before an airline System Board. *Bower v. Eastern Airlines, Inc.*, 214 F.2d 623, 626 (3rd Cir. 1954). The Third Circuit later restated this as a requirement for "a full and fair hearing" requiring the arbitration panel to have "exercised its honest judgment in reaching its conclusions and decisions on the full record." *Hart v. Overseas National Airways*, supra at 392-393.

With regard to airline arbitrations, even the Fifth Circuit has stated its similar view, that a System Board's denial of *due process* has long been a proper basis to vacate an arbitration award. *Giordano v. Modern Air Transport, et al*, 504 F.2d 882, 883 (5th Cir. 1974) (A court can reverse a System Board

"where there is a denial of due process"). In fact, the Fifth Circuit has also noted its view that "[a] federal court does have power to set aside [a System] Board's determination where there is a fundamental absence of due process." *Wells v. Southern Airways*, 517 F.2d 132, 133, (5th Cir. 1975). The D.C. Circuit has taken this a step further, however, defining even a "mistake of fact" by a System Board as potentially rendering an arbitration award as reviewable by the courts. *Northwest Airlines, Inc. v. Air Line Pilots Association International*, 530 F.2d 1048, 1050 (D.C. Cir. 1976) (The courts have "both the power and duty to refuse to enforce [an] award" predicated on a dispositive "mistake of fact."). The D.C. Circuit's view in this regard, however, is more of an aberration, but still in conflict with this case, and with the other circuits.

Naturally, where Congress established the semi-public review and appeal hierarchy as a function of the NRAB, for the railroad industry, there is no meaningful need for the slightly broader court review as might be available to other arbitration cases, in general, or to arbitration cases which might also arise under the *Federal Arbitration Act* (9 U.S.C. §§ 1 et seq.). In fact, in view of this lack of NRAB oversight and review for airlines, Congress quite properly excepted airlines from the most extreme standard of court review which *RLA Title I* established for NRAB originated cases.

Of course, where arbitration review arises in the context of an issue of procedural or substantive *due process*, it is impossible to conclude such violations as

having been allowable within the intent of any agreement. Thus, arbitration awards which are issued in violation of *due process* standards, especially as defined by contract or common law, have also been an issue of varying review standards by the different circuits. Most circuits have decisions which reference *due process* requirements in some form.

As example, in *Pokuta v. Trans World Airlines*, supra at 839, the Seventh Circuit was clear that the denial of *due process* properly fell into its review authority. In fact, it was the denial of *due process* which the Eighth Circuit also noted as an exception for its own very strict standard of review in *Hunt v. Northwest Airlines*, supra at 179. The Fifth Circuit has also espoused a similar view of *due process* as a requirement, where a violation would subject an arbitration decision to review and vacatur. See: *Hall v. Eastern Airlines*, 511 F.2d 663 (5th Cir. 1975), and; *Rosen v. Eastern Airlines*, 400 F.2d 462 (5th Cir. 1968), cert. denied; 394 U.S. 959 (1969).

In Captain Konop's case, to a certain extent, the issues of *jurisdiction* and *due process* intersected at several junctures. Although, during the oral argument before the Ninth Circuit's panel, Judge Callahan noted the *due process* issues which had arisen in relation to some of the misconduct of the Hawaiian System Board, she was constrained by circuit precedent in *Singer v. Flying Tiger* (supra), to limit her reasoning, in support of the district court's *Order to Vacate*, to the narrow issue of jurisdiction alone. Judge Callahan noted that the System Board

lacked authority to act on "matters" which had not first been handled in accordance with the grievance procedures of the labor agreement. See: App. p. 38a

As several of the circuits have recognized, whether or not airlines are subject to the extremely limited standard of review set for railroads, the issue of jurisdiction, even under the strictest standard of review, encompasses a question of *due process*. More important is the fact that, contrary to the Ninth Circuit majority's opinion, "review is not toothless when an arbitrator's award disregards the collective bargaining agreement and its terms." *Beacon Journal Publishing Co v. Akron Newspaper Guild*, 114 F.3d 596, 599 (6th Cir. 1997).

Thus, it has now become important for the Court to clarify its intent, as discussed in *Machinists' v. Central Airlines* (supra), with respect to the "analogous" handling of airline disputes, as *RLA Title I* specifies for railroads. Given the existence and function of the NRAB, as a appeal and review body, it is difficult to reconcile applying the most restrictive standard of review, under *RLA Title I,* to airlines which are subject to a specific statutory exception from such application under *RLA Title II* (45 USC § 181). The reasons for the different railroad standard is otherwise quite clear. However, an arbitrator is not allowed to simply "dispense his own brand of industrial justice" under any circumstance. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, supra 597. Given the growing conflicts, the Court's guidance on this issue has become necessary.

III. Review Will Provide Needed Clarification of the Limited Role of the Courts in *Railway Labor Act* Arbitration Cases, and of the Necessity for Arbitrators to Adhere to the *Plain Language* Limits of Their Authority

In *Machinists v. Central Airlines* (supra), the Court definitively settled that the judiciary primarily plays a supervisory role in the review and enforcement of airline arbitration awards under *Title II* of the *RLA* (45 U.S.C. §§ 181 et seq.). However, there has been conflict and confusion among the circuits concerning both the nature of that limited review, and of the necessity for arbitration panels to act within the defined limits of their contractual authority. *Misco*, supra at 38. Some courts, now including the Ninth Circuit, entirely defer to the arbitrator, even to the extent of declining review of *plain language* jurisdictional violations, as occurred in this case.

The Ninth Circuit majority essentially held that even the review of the *plain language* limits of a arbitrator's authority should be left solely to the arbitrator. App. pp. 2a-3a. That was Hawaiian Airlines' central position in its appeal. Thus, Hawaiian's self-serving viewpoint has now been adopted by the panel majority, where there was supposedly no specific contractual definition providing the explicit intent of the phrase "precise charge or charges," as was incorporated by the labor contract in terms of the *due process* notice which was to be provided to Captain Robert Konop.

The *Dissent*, however, found no ambiguity in the *precision* required of any charges, nor did the district court. Hawaiian was not free to simply abandon the *precise* charges it had provided for something more likely to gain the arbitrator's sympathy. However, the panel majority not only disregarded what the NAA termed the arbitrator's "insensitivity to the requirements for ordinary due process," and an "inexcusable violation of fundamental fairness" (App. p. 58a), but they also ignored contrary case law. For example, if there had indeed been any contract *ambiguity*, the Eighth Circuit holds that, given the arbitrator's failure to seek input from the parties as to their "intent," or their "past practices," any resultant decision "cannot be said to draw its essence from the collective bargaining agreement" and, thus, was given outside the scope of the arbitrator's authority. *Boise Cascade,* supra at 1080. At the same time, "[i]n construing the collective bargaining agreement, however, the arbitrator must take into account any existing common law * * * for it is an integral part of the contract." *Norfolk Shipbuilding v. International Brotherhood of Boilermakers*, 671 F.2d 797, 800 (4th Cir. 1982). App. 66a-76a.

It was undisputed that Hawaiian provided Captain Konop with a pre-termination *Statement of Charges*, including the "precise charges" which had been subject to the required pre discharge company hearing and written decision. However, the arbitrator did not act on those charges, instead relying on new charges, raised for the first time at the

arbitration hearing. Moreover, it was not necessary to *'interpret'* any contract provision, concerning the definition of "precise charge," when the arbitrator considered and relied on charges which were not even arguably incorporated into the broader rules originally cited by Hawaiian as a part of its *Statement of Charges*. However, it is also wholly irrelevant that all this was simply a pretext for the purposes of eliminating Captain Konop as a leader in the opposition to ratification of a concessionary labor contract by Hawaiian's pilots.

As an example of how far afield the arbitrator traveled in Hawaiian's behalf, there was nothing in Hawaiian's charges which faulted Captain Konop for a shortfall in "due diligence," which the arbitrator concluded in relation to the plan of reorganization which Captain Konop and most of Hawaiian's other pilots supported. App. 14a-17a. At the same time, Hawaiian had never previously alleged that the initial financing proposed for the employee alternative plan had been through a financial institution with "mob ties," as the arbitrator referenced in his award and in his discussion of "due diligence." App. 43a. Beyond that, where Hawaiian had accused Captain Konop of intentional misstatements, there was nothing in Hawaiian's charges which asserted that he might also be held culpable for all internet posts on the hawaiianpilots.com website, regardless of the lack of dispute that a single, cited erroneous posting had not been made by Captain Konop, as Hawaiian had originally alleged. App. 44a.

It was the panel *Dissent,* and the district court, which followed the law most faithfully. Nothing in the Court's admonitions in *Enterprise Wheel & Car* (supra) conflicts in any way with the review standard established for arbitration cases which arise under the *Railway Labor Act*, whether it be for railroads under *RLA Title I* or for airlines under *RLA Title II.* In all cases, an arbitrator is not free to "dispense his own brand of industrial justice." Further, "[t]he arbitrator [wa]s not free to ignore the plain language of the contract." *Misco*, supra 38. Thus, the district court's *Order to Vacate* was properly given in line with even the most restrictive possible standard of review.

In *Gilmer v. Interstate/Johnson*, the Court recognized that arbitration is not designed to be a perfect system of justice. *Gilmer v. Interstate/Johnson Lane Corp.*,500 U.S. 20, 31 (1991) ("[A] party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration" quoting; *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). However, the fundamental expectation in every arbitration agreement is that the arbitrator will act ethically, within the bounds of his defined authority, and that the ultimate award "draws its essence from the collective bargaining agreement." *Enterprise Wheel & Car*, supra 597. None of that occurred in this case.

No intent has ever been stated, either in the Congressional Record, or in the decisions of the Court, that airline employees were somehow expected

to bear any particularly different or more onerous burden with respect to arbitration. An arbitrator's violation of the *plain language* limits of his jurisdiction, his "inexcusable violation of fundamental fairness," his total "insensitivity to the requirements of ordinary due process," and his "serious and inexcusable" ethical breaches, do not fall within the contemplations of any arbitration agreement.[8] App. 63a-65a. Thus, the appeals panel majority erroneously reversed the district court, both under the most restrictive standard set in *RLA Title I*, and even more so under the slightly broader scope of review which most of the other circuits have defined in reference to the *Steelworkers* trilogy.[9]

The views of the appeals panel majority, in adopting Hawaiian's appeal premise, would have far reaching adverse consequences, and not just in terms of a lack of *fairness* which the *Dissent* noted. App. 7a.

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[8] Theodore J. St. Antoine, Professor Emeritus and former dean of the Michigan School of Law, was a member of the NAA Tribunal which *Censured* the arbitrator. App. 65a. Professor St. Antoine is an expert on the *Steelworkers Trilogy*, and is regularly cited by the courts concerning the role of arbitrators. i.e. *American Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 6-7 (D.C. Cir. 1986); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Judicial Review of Labor Arbitration Awards*, 75 Mich. L.Rev. 1137 (1977).

[9] *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Manufacturing Co.* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

As was the case with arbitrator Scearce, and as was implied by the National Academy of Arbitrators' in its *Censure*, the panel majority would do little beyond encouraging a more cavalier and haphazard attitude with respect to arbitral decision making. This is a situation which would only detract from the *Railway Labor Act's* clear and fundamental purposes. It would also upset the goal of relative consistency and simplicity in the process of judicial review.

CONCLUSION

Thus, this *Petition for a Writ of Certiorari* should be granted to resolve the growing conflict between the circuits. It should also be granted for those reasons cited in the *Dissent* of Appeals Court Judge Callahan (App. 5a-7a), as was given in support of the district court's *Order to Vacate* (App. 8a-39a). An arbitrator "is not free to ignore the *plain language* of a contract." *Enterprise Wheel & Car*, supra at 597. By the same token, an arbitrator is not free to "dispense his own brand of industrial justice." *United Paperworkers v. Misco*, supra at 38.

Respectfully submitted,

DATED: December 1, 2009

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT C. KONOP, Petitioner - Appellee, v. HAWAIIAN AIRLINES, INC., Respondent - Appellant.	No. 08-55248 D.C. No. cv-06-4426-CBM Central District of California, Los Angeles

MEMORANDUM*

ROBERT C. KONOP, Petitioner - Appellant, v. HAWAIIAN AIRLINES, INC., Respondent - Appellee.	No. 08-55248 D.C. No. cv-06-4426-CBM Central District of California, Los Angeles

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted April 17, 2009

This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Pasadena, California

Before: SILVERMAN and CALLAHAN, Circuit Judges, and QUIST,** District Judge.

Appellant/Cross-Appellee Hawaiian Airlines, Inc. ("Hawaiian") appeals the district court's order vacating an award by the Hawaiian Airlines System Board of Adjustment (the "Board") affirming Hawaiian's discharge of Appellee/Cross-Appellant Robert C. Konop ("Konop"). Konop cross-appeals the district court's denial of his alternative grounds for vacating the award. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse that portion of the district court's order vacating the Board's award, affirm in all other respects, and remand for entry of judgment confirming the Board's award.

I.

The district court correctly recognized that the required notice of "the precise charge or charges" to the employee limits the Board's authority to decide disputes. The district court erred, however, by equating "charges" with "facts" or "evidence." The CBA leaves open what constitutes or suffices as a charge. It does not define a charge, nor does it specify what information, or degree of factual detail, if any, is required. Cf *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1154 (2008) ("Even with the aid of

** The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

regulations the meaning of charge [as used in the ADEA] remains unclear .... "). While the charge must be "precise," this might be merely the difference between a general allegation that the employee's conduct violated the House Rules and an allegation that the employee violated a particular House Rule. In light of this ambiguity and lack of specific guidance from the CBA, the sufficiency and scope of the charges were properly left to the Board's interpretation. *Desert Palace, Inc. v. Local Joint Executive Bd. of Las Vegas,* 679 F.2d 789, 792 (9th Cir. 1982). Because the Board's consideration of facts not specifically alleged in the Statement of Charges did not conflict with any express provision of the CBA, the district court should not have substituted its judgment for the Board's. *W.R. Grace & Co. v. Local Union 759, Int'l union of United Rubber, Cork, Linoleum & Plastic Workers of Am.,* 461 U.S. 757, 765, 103 C. St. 2177, 2183 (1983) ("Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator."). While an arbitrator may not ignore the plain language of the contract in favor of "his own notions of industrial justice," *United Paperworkers Int'l Union v. Misco,* 484 U.S. 29, 38,108 S. Ct. 364, 371 (1987), so long as the arbitrator is even arguably construing the contract, the reviewing court's view of the correctness of the arbitrator's decision - whether factually or legally flawed or even "silly" - is irrelevant. *Major*

League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509,121 S. Ct. 1724, 1728 (2001) ("[I]fan 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision. '") (quoting *E. Assoc 'd Coal Corp. v. Mine Workers*, 531 U.S. 57,62,121 S. Ct. 462, 466 (2000)).

II.

In Konop's cross-appeal, we affirm the issues presented below for the reasons cited by the district court. We decline to consider Konop's claim of fraud and corruption as he failed to raise it before the district court. See *FSLIC v. Butler*, 904 F .2d 505, 509 (9th Cir. 1990) ("As a general rule, an appellate court will not consider arguments which were not first raised before the district court, absent a showing of exceptional circumstances.").

Each party shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

FILED
June 30, 2009
Molly C. Dwyer, Clerk
U.S. Court of Appeals

Konop v. Hawaiian Airlines, Inc.,
Nos. 08-55248 & 08-55314

June 24, 2009

FILED
June 30, 2009
Molly C. Dwyer, Clerk
U.S. Court of Appeals

CALLAHAN, Circuit Judge, concurring and dissenting:

I would affirm the district court's order in its entirety. A decision by the Hawaiian Airlines System Board of Adjustment (the "Board") is entitled to considerable deference, see *Rossi v. Trans World Airlines, Inc.*, 507 F.2d 404, 405 (9th Cir. 1974), including any plausible interpretation of the underlying collective bargaining agreement ("CBA"). See *Sprewell v. Golden State Warriors*, 266 F.3d 979,986 (9th Cir. 2001). However, an award may be unenforceable when the arbitrator "strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice.'" *Major League Baseball Players Ass 'n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Moreover, an arbitrator is bound to abide by the plain language of a collective bargaining agreement that limits his authority. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Hawaii Teamsters and*

Allied Workers Union, Local 996 v. United Parcel Service, 241 F.3d 1177, 1181 (9th Cir. 2001) (holding that an award does not draw its essence from the CBA when the arbitrator ignores the plain language of the agreement).

In this matter, the CBA grants the Board authority to interpret the CBA. ("The Board shall have jurisdiction over disputes ... growing ... out of interpretation or application of any of the terms of the [CBA]."). However, the CBA explicitly states that "[b]efore a pilot is ... discharged, such pilot shall be notified in writing ... of the precise charge or charges against him or her." On appeal, the Board may not consider a "matter" that has not yet been handled in accordance with the previous disciplinary procedure, i.e. a statement of charges and hearing.

Here the Board interpreted "matter" broadly to allow it to consider charges that had not been included in the Statement of Charges ("SOC") filed against Konop. A review of the applicable portions of the CBA indicates that the Board's interpretation of "matter" to mean anything besides specific instances of misconduct charged in the SOC is contrary to the clear purpose and intent of the parties as set forth in the CBA. Thus, the Board's interpretation failed to "draw its essence" from the CBA. When read in conjunction with Section 16, which requires that the precise charge or charges be set forth in the SOC, the only "plausible" reading of the CBA requires that the Board rely only on factual instances of misconduct set

forth in the SOC. Konop was entitled to rely on the SOC to determine what actions he had to defend.

The scheme set forth in the CBA is disrupted when Hawaiian Airlines ("HAL") is allowed to advance new charges before the Board because this deprives an employee of fair standards of notice and renders him unprepared to defend new allegations not set forth in the SOC.[1] Indeed, Konop's attorney made this objection at the hearing. Moreover, the materials before this court suggest that neither HAL nor at least one of the three arbitrators were concerned with fairness.[2] I would affirm the district court's determination that the Board exceeded its jurisdiction when it based its decision on charges that had not been set forth in the SOC.

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[1] This is particularly true in this case because the charges against Konop arose out of his participation in HAL's bankruptcy proceedings, not from his performance of his duties as a pilot. Furthermore, Konop's right to participate in HAL's bankruptcy proceedings had been established in prior litigation between the parties. *Konop v. Hawaiian Airlines, Inc.*, 302 F .3d 868, 883 (9th Cir. 2003). Although the case was cited to the Board, it is not mentioned in the Board's award.

[2] After the district court issued its decision in this case one of HAL's attorneys sent an ex parte letter to the arbitrators asking them to "clarify" their award to avoid the impact of the district court's opinion. One of the arbitrators responded with such a clarification. The district court subsequently found that this attempted clarification was outside the Board's jurisdiction.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JS-6
FILED
Clerk, U.S. District Court
JAN 4, 2008
Central District of California

ROBERT C. KONOP, Petitioner, v. HAWAIIAN AIRLINES, INC. Respondent.	No. 06-4426-CBM Order re Petition for Review and to Vacate an Award of the Hawaiian Airlines System Board of Adjustment

The matter before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding, is Petitioner Robert C. Konop's Petition for Review and to Vacate an Award of the Hawaiian Airlines System Board of Adjustment ("Petition" or "Pet."). The Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 45 U.S.C. §§ 151 et seq.

PROCEDURAL AND FACTUAL BACKGROUND

Pro Se Petitioner Robert C. Konop ("Konop" or "Petitioner") was employed as a pilot by Defendant

Hawaiian Airlines, Inc. ("HAL") for approximately twenty (20) years until his termination on April 20, 2005. Petitioner's employment was terminated while HAL was attempting to emerge from bankruptcy protection. HAL's stated reasons for the termination related exclusively to Petitioner's participation in the bankruptcy proceedings.

HAL pilots are represented by the Air Line Pilots Association ("ALPA"), and the terms and conditions of Petitioner's employment during his tenure with the Airline were at all times governed by a collective bargaining agreement ("CBA") between HAL and the ALPA. Konop appealed his termination with the Hawaiian Airlines System Board of Adjustment ("the Board"). Pursuant to the CBA, the grievance was first submitted to a four member System Board of Adjustment, consisting of two members selected by the ALPA and two members selected by HAL. When the four member Board deadlocked, the grievance was submitted to a three member arbitration Board consisting of a union-preferred member, a management-preferred member, and a neutral outside arbitrator. On or about April 7, 2006, the three member Board affirmed Konop's termination by a 2-1 vote; the dissenting panel member was the union-preferred arbitrator. Pet.,-r 116; System Board of Adjustment Award re Grievance No. HAL-19-05DS ("Award") (attached as Exh. A to the Petition).

On October 11, 2005, Petitioner brought an action under the Railway Labor Act ("RLA") alleging

the termination violated his rights as enumerated in that statute. This Court dismissed the complaint without prejudice for failure to state a claim and for lack of subject matter jurisdiction. See Civil No. 05-7298, Order dated June 27, 2006 at 2. The Court explained that the proper method for attacking the termination was through a petition to vacate the arbitration award. Id. On July 14,2006, Konop filed the instant Petition alleging various grounds for vacating the Board's Award.

STANDARD OF LAW

The scope of judicial review of adjustment board awards under the RLA is among the narrowest known to the law. *English v. Burlington Northern R.R. Co.*, 18 F.3d 741,743 (9th Cir. 1994). The RLA limits review of adjustment board decisions to three specific grounds: (1) failure of the board to comply with the RLA; (2) failure of the board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. Id.; 45 U.S.C. § 153 First (q); see also *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89,93 (1978). The findings and order of the adjustment board are conclusive on the parties and may be set aside only for the three reasons specified in Section 153 First (q). 45 U.S.C. § 153 First (q); *Sheehan*, 439 U.S. at 93. A legal exception to the limited scope of judicial review exists where an arbitration award is unenforceable as contrary to public policy. *Eastern Assoc. Coal Corp. v. United Mine Workers of America*, Dist., 531 U.S. 57,62 (2000).

DISCUSSION

Petitioner does not challenge the System Board's Award on the grounds of fraud or corruption. Rather, Petitioner argues that the Award should be vacated because it (1) exceeded the scope the Board's jurisdiction; (2) failed to comply with the RLA; (3) violated public policy; and (4) that the Board award was issued in disregard of the law.

A. Whether the Board Exceeded the Scope of Its Jurisdiction

Petitioner alleges that the Board failed to conform, or confine itself to matters within its jurisdiction by (1) proceeding on allegations raised for the first time at the System Board hearing; (2) upholding the termination based on of Petitioner's participation in HAL's bankruptcy proceedings; and (3) applying HAL "House Rules" that were never ratified by the ALPA or by Petitioner. Pet. at 18-23, Reply Brief in Support of Petition ("Reply") at 3-5.

1. The Board Failed to Confine Itself to Matters Within Its Jurisdiction When It Considered and Relied on Matters that Were Not Included in HAL's Statement of Charges

Courts will not review the merits of an arbitration award so long as the award is based properly on the applicable collective bargaining agreement and the subject matter is within the board's jurisdiction. *Rossi v. Trans World Airlines,*

Inc., 507 F.2d 404, 405 (9th Cir. 1974); *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1356 (9th Cir. 1981) (overruled on other grounds). An arbitration award must be confirmed if it "draw[s] its essence from collective bargaining agreement." *Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, (1960). However, the "strong admonitions" that steer courts away from the merits and circumscribe judicial review "do not mean that an arbitrator may ignore the plain language of the contract." *Hawaii Teamsters*, 241 F.3d at 1181 (citations omitted). "[A]n arbitrator has no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority." *Id.*

(a) The Plain Language of the CBA Limits the Board's Authority

The CBA between HAL and the ALPA provides that, "[b]efore a pilot is disciplined or discharged, such pilot shall be notified in writing ... of the precise charge or charges against him or her." See HAL 2000 Pilots Agreement § 16.B.1 (attached as Ex. B to Excerpt of Record in Support of Petition). "A hearing shall be held by the Vice President-Flight Operations ... within ten (10) calendar days after receipt of the letter of charge to determine what action, if any, should be taken on the charge or charges." Id. "If the pilot is dissatisfied with any

discipline or discharge action of the Company and desires to appeal, s/he shall, through the Association ... make a written appeal to the Hawaiian Airlines Pilots' System Board of Adjustment . . . . " Id. § 16.B.2.

The CBA provides that the Board has jurisdiction "over disputes between any employee covered by the Pilots' Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement. Id. § 17.C.1. The jurisdiction of the Board covers "any dispute properly submitted to it by the President of the Association or by the Company, when such dispute has not been previously settled in accordance with the terms provided for in Section 16 (Grievances)." Id. However, "[n]o matter shall be considered by the Board that has not first been handled in accordance with the provisions of Section 16 (Grievances) and a decision thereon by the Company." Id. § 17.D.2.

(b) The Board Both Considered and Relied On Matters That Were Not First Handled in Accordance With The Grievance Procedures Set Forth in the CBA

Pursuant to Section 16.B of the CBA, on March 31, 2005, HAL proffered a "Statement of Charges" ("SOC") and removed Petitioner from service with pay pending the outcome of a hearing to "determine what action, if any, should be taken" on the charges. SOC at 1,3 (attached as Ex. C to Excerpt of Record in

Support of Petition). The Statement of Charges, which referred exclusively to Petitioner's participation in HAL's bankruptcy proceedings as the basis for the company's disciplinary action, are set forth below in their entirety:

I. FACTS

Your involvement in the Hawaiian Airlines Bankruptcy Case No. 03-00817-RJF (Chapter 11) ceased on March 11, 2005 with your withdrawal of all of your motions filed in such case, the dismissal with prejudice of your Plan of Reorganization ("POR") by the Bankruptcy Court and a harsh judicial admonishment directed toward you for lying about the court's actions on your public website.

A. **The facts surrounding the dismissal of your POR included numerous falsifications and acts of dishonesty by you including, but not limited to, the following:**

- **Your filing with the court in September 2004 stating that you had a commitment of $100 million dollars to back up your POR; followed by your admission during your deposition on March 4, 2005 that you did not have such financial commitments at the time of that filing;**

- **Your filing with the court in September 2004 stating that your commitment was from "financial institutions and accredited investors" when in fact you admitted in deposition that: (i) you had no understanding of whether either Paul Boghosian or The Barron Group is a financial institution or an accredited investor; and (ii) your belief that Dr. Spencer was an "accredited investor" was based upon Dr. Spencer's affidavits, the first of which was not filed until January 2005, or several months after your September 2004 filing;**

- **Your admission in March 2005 that you in fact had no agreement in effect to deliver the funds underlying your POR; and that you had never met, corresponded by letter or email, or talked on the phone to a Dr. Spencer, the man who you presented to the court as the source of $300 million in funds to support your plan through his E&M Trust;**

- **Your admission that you visited Dr. Spencer's E&M Trust address and observed it to be some sort of "mission" or "community services" building that was located in a bad neighborhood, but you continued on with your representations to the court despite what should have caused you to have serious reservations about the**

legitimacy of the E&M Trust;

- **The filing, on behalf of your POR, of (i) a redacted print-out of a Euroclear computer screen, which purported to show approximately $500 million available in an ABN-Amro Bank of NV account held in the name of E&M Trust and (ii) a letter cosigned by two purported ABN-Amro bank officials confirming that the cash was in the account, both of which later proved to be false documents containing phony names for bank officials and an invalid account number;**

- **Your censure by the bankruptcy court for representing that the court had approved your Disclosure Statement when in fact, as you admitted during your deposition, just the opposite was true.**

B. You were disloyal to the Company through:

- **Your attempts to derail the bankruptcy case by objecting to nearly every substantive motion filed by the Trustee, which in nearly every single case, your objections were overruled by the court and your motions denied;**

- **Your filing of a sham POR that has disrupted and caused additional, unnecessary expense to the Company in**

the processing of its bankruptcy case.

II. RULES VIOLATED

Your above cited actions violated Flight Operations Manual Section 2-1-6, House Rules:

1. **House Rule 14: Falsification or Dishonesty of Any Kind;**
2. **House Rule 14: Making False Statements About Other Employees;**
3. **House Rule 16: Failure or Refusal to Work With Management;**
4. **House Rule 19: Improper conduct at any time or any place which adversely affects the employees relationship with his fellow workers and/or supervisors;**
5. **House Rule 19: Improper conduct at any time or any place which is detrimental to Hawaiian Airlines reputation and/or goodwill among its customers and/or the community as determined by the Company;**
6. **House Rule 20: Conduct or communication that disparages the Company or its reputation, its employees, and/or the quality of its service or product;**
7. **House Rule 20: Disloyalty to the Company**

SOC at 1-3.

At the conclusion of the three member Board arbitration, the System Board of Adjustment issued an Award concluding that HAL demonstrated just cause for the termination of Konop's employment. A review of the 49-page Award reveals that the Board considered and/or relied on several matters that were not included as "precise charges" in the 3-page Statement of Charges. For example, in the "Background" section, the Award references a March 2003 "incident" in which Petitioner Konop visited HAL's System Operations Control Center, and sent a letter advising the Company's Vice President of Operations of his opinions of the Control Center's effectiveness. Award at 4-5. By letter dated April 9, 2003, the Vice President of Operations responded to Petitioner "that his presence in the SOC was unsolicited and without authorization, that his interaction with personnel at the Center was unwelcome and considered a disruption of work progress." Id. This incident is not included in HAL's Statement of Charges against Konop.

The Award also details several motions and applications filed by Konop with the bankruptcy court. See e.g., Award at pp. 8-9 (discussing Konop's motion for "Air Safety Conservator"); Award at 10-11 (detailing Konop's motion for "Preliminary Injunction Barring Extraordinary Expenditures by Trustee Gotbaum"); Award at 22-23 (describing Konop's TRO "Prohibiting Extraordinary Expenditures by the Trustee"). While the Statement of

Charges generally references Konop's "object[ions] to nearly every substantive motion filed by the Trustee," and details some of Konop's POR-related filings, the SOC does not mention any of the affirmative motions and applications filed by Konop and discussed in the Award. See Statement of Charges, passim.

At the outset, the Award indicates that where appropriate, and "for the sake of continuity, the Board may include references to related events, that do not necessarily bear on the issue." Award at 3. Thus, it is unclear whether uncharged information that was only cited in the Background section of the Award supported the Board's decision to uphold the termination. However, the Board's factual findings, contained in the "Discussion and Findings" section of the Award, likewise include facts that were not alleged in the Statement of Charges.

The Discussion and Findings provide that, during the bankruptcy proceedings, Konop "derided members of management, criticized Company procedures, accused officials of causing the bankruptcy through improper decision making, challenged the integrity of certain individuals - all without offering proof of such charges." Award at 46. The Board concluded that "the company has demonstrated that the Grievant repeatedly made false or unproven statements about other employees .... " Award at 48.

The Board also found that Konop "disparaged

Company officials to other employees and potentially the general public via his website" and that he "brought adverse attention to the Company by the notoriety associated with attempting to involve the company with disreputable persons." Award at 48-49. Although these factual findings may support the Board's conclusion that Konop violated certain "House Rules," the factual allegations themselves are not found in the Statement of Charges.

The System Board of Adjustment lacks jurisdiction over matters that have "not first been handled in accordance with the provisions of Section 16" of the CBA, and Section 16 requires that "[b]efore a pilot is disciplined or discharged, such pilot shall be notified in writing ... of the precise charge or charges against him or her." Because the Board considered and relied on allegations and facts that are not set forth as precise charges against Petitioner in HAL's Statement of Charges, the Court finds that the Board failed to confine itself to matters within its jurisdiction in issuing its Award.

2. The Board Did Not Exceed Its Jurisdiction By Applying HAL's "House Rules"

Petitioner alleges that the Board also exceeded its authority by imposing and applying HAL's "House Rules," which had been expressly rejected during the collective bargaining process, not only by his union representative, but also specifically

and individually by him. Pet. at 21-23. According to Petitioner, the Rules are not, therefore, part of the collective bargaining agreement.

While an arbitrator has "no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority," if the CBA is not explicit, the arbitrator may look for guidance from other sources, including "house rules," or the "common law of the shop." Rossi, 507 F.2d at 405; Hawaii Teamsters, 241 F.3d at 1178, 1181-84 (upholding termination for violation of "house rules"). The law of the shop is "equally a part of the collective bargaining agreement although not expressed in it." Hawaii Teamsters, 241 F.3d at 1181. This approach is necessary because CBAs cannot expressly regulate every conceivable employment matter. As the Supreme Court has stated:

> Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions.

United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 583 (1960).

Here, the Board explicitly stated that it applied HAL's "House Rules" in its analysis of Konop's termination. See Award at 3 (indicating that Board limited "its attention to ... the question as to whether actions by the Grievant that are set out in the record are properly deemed to be violations of the several House Rules cited by the Company .... "). Although the House Rules are not mentioned in the 2000 Pilots Agreement, there is no evidence that the House Rules conflict with any express provision of the Pilots Agreement. Further, the Board found that HAL was permitted under the CBA to "promulgate and enforce reasonable rules and regulations concerning the performance of its employees," provided such rules did not conflict with a negotiated term of the agreement. Award at 45-46.

In upholding Konop's termination, the Board interpreted the CBA to allow disciplinary action for violation of HAL's House Rules. See English, 18 F.3d at 746 (finding Board "implicitly interpreted" the CBA to permit termination for employee's conduct). "Unfamiliar with 'the practices of the industry and the shop,' courts are not competent to second-guess an arbitrator's judgment." Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Intern. Ass'n of Machinists, 886 F.2d 1200, 1207 (9th Cir. 1989). More importantly, even if this Court disagreed with the arbitrator's findings, the Court is "barred from disregarding the arbitrator's factual determinations" respecting the terms of the parties' CBA. Id. The Court therefore finds that the Board did

not exceed its jurisdiction when it upheld Petitioner's termination based his violation of HAL's "House Rules."

3. The Board Upheld Petitioner's Termination Based on the Manner of Petitioner's Bankruptcy Participation and Not Because of the Participation Itself

Petitioner asserts that the Board exceeded its jurisdiction because all of the charges in the Statement of Charges reference Petitioner's participation in HAL's bankruptcy. Specifically, Petitioner asserts that the Board (1) lacks jurisdiction to interpret or enforce the Bankruptcy Code, and (2) exceeded its jurisdiction by sustaining "Konop's employment termination for lawful off-the-job activities, conducted away from the workplace." Pet. at 19-20. Petitioner is incorrect on both points.

The Board did not endeavor to interpret or enforce the Bankruptcy Code when it upheld Petitioner's termination. It merely considered Petitioner's conduct during the bankruptcy proceedings, and whether that conduct violated HAL's House Rules. The Board did not deny that Petitioner had "standing" to participate in the Bankruptcy (Award at 47), but found that the manner of his participation violated the House Rules and justified his termination. Award at 45-49. This Court will not consider the merits of the Board's factual findings. *Eastern*, 531 U.S. at 62 citing

United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (holding the proper judicial approach to a labor arbitration award is to refuse to review the merits).

Nor did the Board exceed the scope of its jurisdiction when it affirmed the discharge based on Konop's off-the-job activities. See *English*, 18 F.3d at 745-46. A system board "exceeds its jurisdiction if it issues a decision without foundation in reason or fact." Id. at 746. "The basis of the Board's award must be rationally inferable from the letter or purpose of the collective bargaining agreement." Id. Again, however, the "interpretation of the collective bargaining agreement is for the Board to decide and not the courts." Id.

In *English*, a railroad employee was terminated for an off-duty incident in which he assaulted another employee on private property. Id. at 743, 746. The arbitration board upheld the termination, ruling it was justified because the assault was "related to his employment" in that it was provoked by on-the-job events, and because it "adversely affected the railroad." Id. On appeal, the Ninth Circuit found that the "Board implicitly interpreted the [CBA] to allow disciplinary action for conduct such as English's, even though the conduct occurred while off-duty and not on Burlington's property." Id. The Ninth Circuit concluded that this decision was not wholly without foundation in reason or fact and therefore did not exceed the Board's jurisdiction. Id.

The Board here interpreted the CBA to permit termination for violation of HAL "House Rules." The Board also found that Petitioner's conduct adversely affected HAL by inter alia disparaging Company officials to other employees and potentially the general public via his website, bringing adverse attention to the company, and by delaying or interfering with the efforts of the Trustee to bring the Company out of bankruptcy, including making false claims before the bankruptcy court. Award at 48-49. The Board concluded that the "fact that such activities were not related to his status as a pilot does not detract from the gravity of the violations of the House Rules." Award at 49. Like the decision in *English*, the Board's decision here is "not wholly without foundation in reason or fact and thus, the Board's decision does not exceed its jurisdiction" merely because it rests on Petitioner's off- the-job conduct. *English*, 18 F.3d at 746.

B. Whether the Board Failed to Comply with the RLA

Petitioner claims the Board Award violated the RLA because he was terminated for his concerted labor activities in contravention of 45 U.S.C. § 151 (a). Pet. at 23-24. One of the purposes of the RLA is to "forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization." 45 U.S.C. § 151(a). The

RLA also provides for "the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes" of the RLA. Id.

Petitioner alleges that he was engaged in a number of concerted activities that were protected under the RLA, including (1) opposing ratification of concessionary labor contracts; (2) seeking a change in union representation; (3) seeking changes in elected union officers; (4) aiding other pilots in filing grievances; and (5) supporting an alternative plan of reorganization ("POR") for HAL in bankruptcy court that would leave HAL employees "unimpaired by Hawaiian's reorganization." Pet. at 24.

Petitioner claims that he worked in concert with other employees to encourage HAL employees to reject newly proposed concessionary labor contracts by (I) establishing an internet website to facilitate employee communication regarding labor contract proposals; (2) distributing materials on file with the bankruptcy court relating to HAL's financial condition; (3) distributing materials related to the legal rights of employees in light of HAL's bankruptcy; (4) distributing materials relating to the trustee's POR; (5) proposing an alternative POR; (6) conducting business research and planning regarding HAL's post reorganization operations; and (7) authoring a proposed business plan that would leave employee labor contracts intact. Petitioner argues that the System Board's decision violates the RLA because it is based on these purported concerted

labor activities.

However, only two of these activities - the POR submission and website maintenance - were expressly referenced in the Board's "Discussion and Findings" upholding Petitioner's termination. With respect to Petitioner's proposed alternative PORs, the Board upheld Petitioner's termination, not because he submitted alternative PORs, but because the company "demonstrated" that Petitioner "falsified and made representations concerning crucial aspects of the POR with which he was associated before the Bankruptcy Court." Award at 48. The Board also found that the PORs did not meet with "appropriate standards" for submissions to the Court, including that such submissions be "factual, truthful and free of deception." Award at 47.

Regarding the website, the Board found Petitioner's termination was justified, not because he maintained the website, but because the website made false claims regarding the status of the alternative POR in the bankruptcy court. Id. Although Petitioner disclaimed responsibility for preparing the false statement, the Board found he was "reasonably held responsible" for the content of his website. Id. The Board concluded that these activities violated HAL's House Rules. This Court may not consider the substantive merit of these findings on review.

Finally, the jurisdiction of the System Adjustment Board over "minor" disputes is limited

to disputes growing out of interpretation of the CBA.[1] *Fennessy v. Southwest Airlines, Co.*, 91 F.3d 1359, 1361-62 (9th Cir. 1996); *Norris*, 512 U.S. at 252-66 (1994) ("the category of minor disputes contemplated by § 151a are those that are grounded in the collective-bargaining agreement"). RLA statutory claims are outside the jurisdiction of the Board. *See Fennessy*, 91 F.3d at 1364 (holding the "Board of Adjustment has no jurisdiction over the statutory claim" under section *152); see also Norris*, 512 U.S. at 254 ("[B]oth the traditional role of the arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]" *(quoting Northwest Airlines/Airline Pilots Assn., Int'l Sys. Bd. Of Adjustment,* Decision of June 28, 1972, p.13)). Petitioner's claim, that he was discharged for engaging in protected labor activities, "rests not upon a collective bargaining contract, but upon a charge that [HAL] violated the statute;" such charge is "within the jurisdiction of the district court rather than an adjustment board." *Id. quoting Roscello v. Southwest Airlines Co.*, 726 F2d 217, 220, n.2 (5th Cir. 1984). Indeed, Petitioner has separately filed a Complaint with this Court alleging he was wrongfully terminated for his concerted labor activities in violation of the RLA.

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[1] The System Board also has jurisdiction over "major" disputes relating to the "formation of collective bargaining agreements or efforts to secure them." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994).

C. Whether the Board Award Violates Public Policy

Because the parties bargain for the System Board's construction of the CBA, courts view arbitration awards as interpreting the contractual agreement between the parties. *Eastern*, 531 U.S. at 61-62. As with any contract, courts will not enforce an award that contravenes public policy. *Stead Motors*, 886 F.2d at 1210 n.9. However, the scope of judicial review of arbitration awards under the public policy exception is "extremely narrow." *United Transp. Union v. Union Pac. R.R. Co.*, 116 F.3d 430, 433 (9th Cir. 1997); *Stead Motors*, 886 F.2d at 1212.

> While a court should be reluctant to do so, it may vacate an award for violating a public policy that is explicit, well-defined, and dominant as ascertained by reference to the laws and legal precedents and not from general considerations of proposed public interest. The court must focus on the award itself, not the behavior or conduct of the party in question .... In other words, to vacate an award on public policy grounds, the court must find that the policy is one that specifically militates against the relief ordered by the arbitrator.

S. Cal. Gas Co. v. Util. Workers Union of Amer., Local 132, AFL-CIO, 265 F.3d 787, 794-95 (9th Cir. 2001) (emphasis supplied) (citations omitted). The relevant inquiry is whether the "specific terms contained in the [Award] violate public policy," by creating an

"explicit conflict with other 'laws and legal precedents' .... " *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29,43 (1987); *see also Eastern, 531 U.S. at 62-63.*

Petitioner alleges that the arbitration Award should be vacated as contrary to explicit public policies articulated in (1) the California Labor Code, (2) the Railway Labor Act, and (3) the federal Bankruptcy Code.

1. The California Labor Code Does Not Support Vacating the Award

Petitioner argues that his termination violates explicit public policy because California Labor Code Sections 98.6(a) and 96(k) prohibit employers from discharging employees as a result of lawful off-the-job conduct. Pet. ¶ 114. Cal. Labor Code § 98.6 proscribes termination for employee conduct specified in delineated Labor Code provisions, "including the conduct described in subdivision (k) of Section 96." *See* Cal. Labor Code § 98.6(a). Section 96, subdivision (k), provides, in pertinent part:

> "The Labor Commissioner...shall, upon the filing of a claim therefor by an employee... take assignments of ... [¶] (k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during non-working hours away from the employer's premises."

Cal. Labor Code § 96(k). However, Section 96(k) does not set forth independent public policy that provides employees with substantive rights or protections. *Barbee v. Household Auto. Fin. Corp.*, 113 Cal. App. 4th 525, 533 (2003). Section 96(k) merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, "recognized constitutional rights." Id. (emphasis supplied).

Petitioner alleges that he was terminated for participating in HAL's bankruptcy proceedings and for concerted labor activities undertaken during nonworking hours and away from his employer's premises. Pet. ¶¶ 115, 120. However, as set forth above, Petitioner's termination was not upheld because he was engaged in lawful activities outside of work, but because of the manner in which he engaged in those activities. Further, Petitioner neither alleges nor argues that his termination violated "recognized constitutional rights" as required to assert a violation of Cal. Labor Code §§ 98.6(a) and 96(k).

2. The Award Does Not Violate Public Policy of the RLA

Petitioner alleges that the public policy of the RLA, which prohibits an employer from interfering with the organization of its employees, supports this Court's exercise of its narrow discretion in overturning the Board Award. Pet. ¶¶ 111, 120. The Court is constrained in this review to determine whether the "specific terms" contained in the Award

violate public policy. See *Misco*, 484 U.S. at 43; *Eastern*, 531 U.S. at 62-63. As discussed above, to the extent the Award relies on actions that Petitioner describes as concerted labor activities, it does so based on its findings that Petitioner's misrepresentations and falsifications violated HAL's House Rules and justified his termination. The Award does not create an "explicit conflict" with the RLA because its findings and conclusions do not support Petitioner's claim that the termination was upheld because of his concerted labor activity. See id.

In conducting this review, the Court does not consider the conduct of the parties in question. *See S. Cal. Gas Co.*, 265 F.3d at 794-95. ("The court must focus on the award itself, not the behavior or conduct of the party in question."). Focusing, as it must, on the terms of the Award, the Court concludes that the Award does not create an explicit conflict with the RLA.

3. The Bankruptcy Code Does Not Support Vacating the Award

Petitioner looks to the Bankruptcy Code as a third source of public policy, and argues that, as a creditor of HAL, he had a right to "appear and be heard" by the bankruptcy court, and a right to propose a reorganization plan. Pet. ¶¶ 112-123 *citing* 11 U.S.C. § 1109(b); 11 U.S.C. § 1121(c). Petitioner is correct that the Bankruptcy Code authorizes such participation. 11 U.S.C. § 1109(b) provides: "A party

in interest, including ... a creditor ... *may* raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b) (emphasis supplied). 11 U.S.C. § 1121(c) provides: "Any party in interest, including ... a creditor *may* file a plan if and only if -- (1) a trustee has been appointed under this chapter..." 11 U.S.C. § 1121(c) (emphasis supplied). However, even assuming this statutory authority *permitting* Petitioner's bankruptcy participation also constitutes an "explicit, well-defined, and dominant" policy that "specifically militates" against terminating him for such participation, the Board's Award did not uphold Petitioner's termination because he participated in HAL's bankruptcy pursuant to these statutes.

HAL argues that the Board upheld Konop's termination because of his dishonest conduct before the bankruptcy court. The Award confirms that the Board relied, at least in part, on its factual findings concerning Petitioner's false representations to the court:

> While the Association pointed out that the Grievant had standing with the Court, as evidenced by acceptance of his Motions and Objections, the Grievant also had an obligation to meet appropriate standards for such presentations. It is reasonable to conclude that such submissions would be factual, truthful and free of deception. The PORs presented by the Grievant on behalf of himself, as well as with others, did not meet that standard; this

> was particularly true insofar as the important aspect of available funding was concerned. While the Grievant made repeated representations to the Court of the availability of such funding, in point of fact none ever existed, or if it did, no proof was presented to substantiate such claims. Moreover, the source of such alleged funds was determined to be suspect as to its legitimacy. It was his obligation to do due diligence to ensure the validity of his claims before the Court. When questioned about that aspect of the PORs, the Grievant attempted to avoid responsibility by belatedly contending that he lacked the necessary qualifications or experience to do so. Whether he intentionally made false claims before the Court or failed to ensure the integrity of such claims out of a lack of competency he committed a serious error for which he was personally responsible. The fact that the Court did not charge him with fraud does not detract from the violation of applicable House Rules that occurred.

Award at 47-48. The Court agrees that public policy does not support making false statements or misrepresentations in court, and that a party appearing before the court has an obligation to exercise due diligence to ensure the validity of claims made to the court.

The Award also indicates, however, that the Board did not rely exclusively on Petitioner's dishonest participation in the bankruptcy

proceedings as a basis for termination. In response to the ALPA' s contention that the charges brought against Grievant only related to his involvement with several versions of PORs filed with the Court, the Board pointed to HAL's Statement of Charges, which include a charge of disloyalty for Konop's "attempts to derail the bankruptcy case by objecting to nearly every substantive motion filed by the Trustee .... " Award at 46. The Board then made factual findings in support of the disloyalty charge:

> In point of fact, the Grievant involved himself in the bankruptcy right from its outset: he derided members of management, criticized Company procedures, accused officials of causing the bankruptcy through improper decision making, challenged the integrity of certain individuals -- all without offering proof of such charges .... His repeated challenges to the Trustee's actions by his presentations to the Court were rejected by the Court.

Award at 46-47. The Board concluded that "the Company has demonstrated that the Grievant repeatedly made false or unproven statements about other employees, falsified and made representations concerning crucial aspects of the POR with which he was associated before the Bankruptcy Court, [and] delayed or interfered with the efforts of the Trustee to bring the Company out of bankruptcy .... "

The relevant inquiry is not whether Petitioner's participation in the bankruptcy could

support just cause for upholding his termination; rather, it is whether the Board's interpretation of the collective bargaining agreement which resulted in upholding the termination violated public policy. Eastern, 531 U.S. at 62-63. Having reviewed the A ward, the Court concludes that the Board found that Petitioner's participation in HAL's bankruptcy was dishonest and served to delay and interfere with the Trustee's efforts to bring HAL out of bankruptcy in violation of HAL's House Rules. The Court finds that there is no public policy, explicit or otherwise, that supports dishonest participation in court proceedings, or actions that serve to delay or interfere with court proceedings. Accordingly, the Court finds that the Board Award upholding Petitioner's termination does not implicate any public policy stated in the Bankruptcy Code.

D. Courts May Not Reverse Arbitration Awards on the Ground of Legal Error

Petitioner argues that the Award, which found that Konop "made false or unproven statements about other employees [and] disparaged Company officials to other employees and potentially the general public via his website," was issued in manifest disregard of the law. Reply at 9. Petitioner claims that the Board was supplied the full text of the Ninth Circuit's opinion in *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), and that the ALPA post-hearing brief provided an explanation of the case and its implications. Reply at 10. In

Konop, the Ninth Circuit held, inter alia, that Konop's website publication constituted protected union organizing activity under the RLA, and that the RLA protects "even false and defamatory statements unless such statements are made with actual malice - i.e. knowledge of falsity or with reckless disregard for the truth." *Konop*, 302 F.3d at 882-83.

Petitioner claims that the Court may vacate the Award where "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." Reply at 10-11. However, none of the cases cited by Petitioner in support of this argument involved arbitration awards under the RLA, and the standard and scope of available review in those cases differed from scope of review available here.[2]

Petitioner's effort to characterize the issue

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[2] *Appalachian Reg. Healthcare, Inc. v. United Steelworkers of Amer.* , 245 F.3d 601 (6th Cir. 2001) (employment arbitration award, but not under the RLA); *Halligan v. Piper Jaffray, Inc.*, 148 F .3d 197, 202 (2d Cir. 1998) (NASD arbitration board entered award pursuant to employment arbitration agreement); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818 (2d Cir. 1997) (same); *Merrill Lynch, Pierce, Fenner & Smith v. Jaros*, 70 F.3d 418 (6th Cir. 1995) (arbitration award entered pursuant to securities account arbitration clause); *Wilko v. Swan*, 346 U.S. 427 (1953) (same).

presented as one of law "does not alter the availability or scope of judicial review: The dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act." *Sheehan*, 439 U.S. at 93. As stated above, the RLA limits review of adjustment board decisions to three specific grounds: (1) failure of the board to comply with the RLA; (2) failure of the board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. Further, Section 153 First (q) of the RLA "unequivocally states that the 'findings and order of the [Adjustment Board] shall be conclusive on the parties' and may be set aside only for the three reasons specified therein." Id. quoting 45 U.S.C. § 153. Courts "do not sit to hear claims of ... legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Hawaii Teamsters*, 241 F.3d at 1180.

The Board, in issuing its Award, considered the ALPA's argument that Petitioner's disparaging statements were protected speech (see Award at 43), but nonetheless found that HAL had just cause to terminate him for violating HAL's House Rules. See Award at 43, 46-49. Even if the Board's decision reflects an error of law, this Court may not reverse the Award on the ground of "legal error" without exceeding the proper scope of its review. *Hawaii Teamsters*, 241 F.3d at 1180; *Sheehan*, 439 U.S. at 92-93; *see also Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752, Int'l Brotherhood of*

Teamsters, 989 F.2d 1077, 1080 (9th Cir. 1993) (holding that "a reviewing court is bound-under all except the most limited circumstances-to defer to the decision of the arbitrator, even if that decision finds the facts and states the law erroneously") (citations omitted).

CONCLUSION

Pursuant to 45 U.S.C. § 153 First (q), the Court GRANTS the Petition for Review. The Court VACATES the award of the Hawaiian Airlines System Board of Adjustment on the grounds that the Board exceeded the scope of its jurisdiction when it considered and relied on factual allegations against Petitioner that were not set forth as precise charges in HAL's Statement of Charges.

IT IS SO ORDERED.

DATE: January 4, 2008

s/ Consuelo B. Marshall

CONSUELO B. MARSHALL
United States District Judge

In the Matter of Arbitration	:	
Between	:	
	:	Grievance No.
Hawaiian Airlines, Inc.	:	HAL-19-05DS
"Company"	:	
and	:	Robert C. Konop
	:	
Air Line Pilots Association	:	
"Association"	:	
	:	
Before: System Board of	:	
Adjustment	:	
	:	

This case involves a dispute over the discharge of the Grievant, Robert C. Konop, on the charge of violating "House Rules" 1 4, 16, 19 and 20 as found in the Flight Operations Manual, Section 2-1-6. The hearing was held October 25-27, 2005 at the offices of Marr, Hipp, Jones and Wang, Attorneys at Law, in Honolulu, Hawaii and was continued on December 10, 2005 at the offices of the Air Line Pilots Association in San Bruno, California. Both parties were afforded a full opportunity to present, examine and cross-examine witnesses and to submit exhibits. The proceedings were recorded by public stenographers. Copies of the transcripts were received in due course. Both parties closed argument by briefs, which were received March 14, 2006.

* * *

[Pages 2-45 Not Included Here]

THE ISSUE

Did the company have just cause to terminate the employment of the Grievant, Robert Konop; if not, what shall the remedy be?

DISCUSSION AND FINDINGS

It is important at the outset to establish that the Company has a right to promulgate and enforce reasonable rules and regulations concerning the performance of its employees; it also has an obligation to apply them uniformly and consistently. Such right is not diminished or altered by the presence of a collective bargaining relationship for an employee group, unless the it can be demonstrated that such rule(s) is in conflict with a negotiated term of the Agreement or that a company otherwise agrees to make any such change(s). This right is intact even if the bargaining representative has not participated in the drafting of such rules and regulations. The effectiveness of such rules is not diminished by the refusal of an employee to sign a commitment to abide by then [sic], although such refusal might better be dealt with at that point in time. Conversely, it is the right of a bargaining representative to challenge any such rule if it is deemed to conflict with a negotiated provision of the collective bargaining agreement.

The Association contends that the Charges brought against the Grievant relate only to his

activities involving several versions of the PORS, which he either personally executed or was a participant with others as a "principal proponent." The statement of Charges dated March 31, 2005 indicate otherwise: As part of Section 13 of such document includes the Charge of disloyalty for

> "Your attempts .to derail the bankruptcy case by objecting to nearly every substantive motion filed by the Trustee, which in nearly every single case, your objections were overruled by the court and your motions denied; ... "
>
> (Jt Ex 2)

In point of fact, the Grievant involved involved himself in the bankruptcy right from its outset: he derided members of management, criticized Company procedures, accused officials of causing the bankruptcy through improper decision making, challenged the integrity of certain individuals - - all without offering proof of such charges. The full scope of such activities on the Grievant's part is set out in some detail in this document. His repeated challenges to the Trustee's actions by his presentations to the Court were rejected by the Court.

While the Association pointed out that the Grievant had standing with the Court, as evidenced by acceptance of his Motions and Objections, the Grievant also had an obligation to meet appropriate standards for such presentations. It is reasonable to conclude that such submissions would be factual,

truthful and free of deception. The PORs presented by the Grievant on behalf of himself, as well as with others, did not meet that standard; this was particularly true insofar as the important aspect of available funding was concerned. While the Grievant made repeated representations to the Court of the availability of such funding, in point of fact none ever existed or, if it did, no proof was presented to substantiate such claims. Moreover, the source of such alleged funds was determined to be suspect as to its legitimacy. It was his obligation to do due diligence to ensure the validity of his claims before the Court. When. questioned about that aspect of the PORs, the Grievant attempted to avoid responsibility by belatedly contending that he lacked the necessary qualifications or experience to do so. Whether he intentionally made false claims before the Court or failed to ensure the integrity of such claims out of a lack of competency, he committed a serious error for which he vas personally responsible. The fact that the Court did not charge him with fraud does not detract from the violation. of applicable House Rules that occurred.

Finally, the Grievant attempted to excuse himself from any responsibility for the statement on his website which alleged that the Bankruptcy Judge had accepted the financial exhibits presented by the HIP/HARC/Konop group as proof of financial capability. He contended he did not prepare such statement, and that his website was available to a number of other people who could have done so. Even

if the Grievant did not prepare such statement, he is reasonably held responsible for the contents of such website, which apparently was made available to Company employees, if not others. In this specific incident, it is apparent that the intent was to influence other employees by use of false claims concerning the financial status of the HIP/HARC /Konop POR.

While the Association presented a well-reasoned and insightful defense, the Company has demonstrated that the Grievant repeatedly made false or unproven statements about other employees, falsified and made representations concerning crucial aspects of the POR with which he was associated before the Bankruptcy court, delayed or interfered in the efforts of the Trustee to bring the Company out of bankruptcy, disparaged Company officials to other employees and potentially the general public via his website and brought adverse attention to the Company by the notoriety associated with attempting to involve the Company with disreputable persons. The fact that such activities were not related to his status as a pilot does not detract from the gravity of the violations of the House Rules. The Award is drawn according.

AWARD

The Company has demonstrated just cause for the termination of employment of the Grievant, Robert Konop; grievance is denied.

System Board Members

s/ James S. Scearce
James S. Scearce
Chairman/Neutral Member

s/Barbara Falvey
Barbara Falvey
Company Member
"s/Concur"

s/Steve Malin
Steve Malin
Association Member
"s/Dissent"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
September 11, 2009
Molly C. Dwyer, Clerk
U.S. Court of Appeals

ROBERT C. KONOP, Petitioner - Appellee, v. HAWAIIAN AIRLINES, INC., Respondent - Appellant.	No. 08-55248 D.C. No. cv-06-4426-CBM Central District of California, Los Angeles

ORDER

ROBERT C. KONOP, Petitioner - Appellant, v. HAWAIIAN AIRLINES, INC., Respondent - Appellee.	No. 08-55248 D.C. No. cv-06-4426-CBM Central District of California, Los Angeles

Before: SILVERMAN and CALLAHAN, Circuit Judges, and QUIST,* District Judge.

* The Honorable Gordon J. Quist, Senior United States District Judge for the Western District of Michigan, sitting by designation.

Judges Silverman and Quist have voted to deny Petitioner-Appellee's petition for rehearing and Judge Callahan has voted to grant the petition for

rehearing. Judges Silverman and Callahan have voted to reject the petition for rehearing en banc and Judge Quist so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

RAILWAY LABOR ACT (Excerpts)

45 U.S.C. § 153. National Railroad Adjustment Board

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided —

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the

District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, that such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any

carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

* * *

45 U.S.C. § 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter **except section 153** of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

* * *

45 U.S.C. § 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the

facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Hawaiian Airlines 2005 Pilots Agreement
[Excerpts]

Section 16

GRIEVANCES

* * *

B. DISCIPLINE AND DISCHARGE

1. Before a pilot is disciplined or discharged, such pilot shall be notified in writing by certified mail, return receipt requested, of **the precise charge or charges against him** or her. S/he shall be given the necessary time, not to exceed seven (7) calendar days from date of receipt, in which to secure the presence of witnesses and shall have the right to be represented by a Company employee of his or her choice or his or her duly accredited representative(s). **A hearing shall be held by the Vice President-Flight Operations**, or his or her designee, within ten (10) calendar days after receipt of the letter of charge **to determine what action, if any, should be taken on the charge or charges**.

   a. Within ten (10) calendar days after the close of the hearing, a decision shall be announced in writing and, if requested by the pilot, a copy shall be furnished to the Contract Administration Department of the Association, MEC Grievance Chairman and the MEC Chairman.

* * *

Hawaiian Airlines 2005 Pilots Agreement

D. GENERAL

1. The time limits set forth in Paragraphs A & B of this Section may be extended by mutual agreement of the Company and the grievant or the Association.

2. If any decision of the Company under the provisions of this Section is not appealed by the grievant(s) within the time limits prescribed herein for such appeal or any extension mutually agreed upon, the decision of the Company shall be final and binding. **If any hearing or decision required of the Company under the provisions of this Section is not provided within the time limits herein, or any extension mutually agreed upon, the grievant(s) position shall be sustained, and the relief requested shall be granted.**

* * *

7. All notification in writing shall be accomplished by certified mail, return receipt requested, addressed to the last known address of the party to whom the notice is being given. All time limits specified in this Section shall be determined by the date on the return receipt.

* * *

Hawaiian Airlines 2005 Pilots Agreement
[Excerpts]

Section 17

A. ESTABLISHMENT OF SYSTEM BOARD OF ADJUSTMENT.

1. In compliance with Section 204, Title II of the Railway Labor Act, as amended, there is hereby established a System Board of Adjustment, which shall be known as the "Hawaiian Airlines Pilots System Board of Adjustment" hereinafter referred to as the "Board". The Board's purpose shall be to adjust and decide disputes that may arise under the terms of the Pilots' Agreement when such disputes have been properly submitted to the Board.

* * *

C. JURISDICTION OF THE BOARD

1. The Board shall have jurisdiction over disputes between any employee covered by the Pilots' Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto, or as subsequently executed.

Hawaiian Airlines 2005 Pilots Agreement

2. The **Board shall consider any dispute properly submitted to it by the President of the Association or by the Company**, when such dispute has not been previously settled in accordance with the terms provided for in Section 16 (Grievances).

* * *

D. PROCEEDINGS BEFORE THE BOARD

1. All disputes properly submitted to the Board for consideration shall be addressed to the Members of the Board, including all papers and exhibits in connection therewith. Each case submitted shall show:

   a. Question or questions at issue;
   b. Statement of facts;
   c. Position of employee or employees; and
   d. Position of the Company.

2. When possible, joint submissions should be made but if the parties are unable to agree upon a joint submission, then either party may submit the dispute and its position to the Board. **No matter shall be considered by the Board that has not first been handled in accordance with the provisions of Section 16 (Grievances) and a decision thereon by the Company**.

* * *

San Francisco Contract Administration
Air Line Pilots Association, International

1150 Bayhill Drive, Suite 2200 San Bruno,
California 94066-3004

Phone 650-872-7028 FAX 650-872-7086

April 26, 2005

Certified Mail - Return Receipt
Receipt # 7002 2410 0004 7397 3737

Mr. Robert Glasgow
Company System Board Member
Hawaiian Airlines, Inc.
PO Box 30008
Honolulu International Airport
Honolulu, HI 96820-0008

Captain Steven Malin
ALPA System Board Member
2333 Kapiolani Blvd, Suite # 2909
Honolulu, HI 96826

Captain Bill Seavy
Company System Board Member HAWAIIAN
AIRLINES, INC.
3375 Koapaka St Ste G350
Honolulu, HI 96819-1804

Captain Ray Moudy
ALPA System Board Member
92-328 Kiowao Place
Kapolei, Hawaii 96707

Re: HAL-19-05DS, Robert Konop (Discharge)

Dear Gentlemen:

In the Agreement between Hawaiian Airlines, Inc., and the airline pilots in its service, as represented by the Air Line Pilots Association, International, relating to the establishment and maintenance of a System Board of Adjustment, which Agreement was effective January 1, 2001, there appears the following paragraph:

> The Board shall consider any dispute properly submitted to it by the President of the Association or by the Company, when such dispute has not been previously settled in accordance with the terms provided for in Section 16 (Grievance).

Herewith is submitted for consideration and decision by the above-described Board, the individual grievance filed by Robert Konop.

1. Question at Issue:

   a. Whether the Company had just cause to terminate the employment of Captain Robert Konop, as set forth in its letter of April 20, 2005.

   b. If not, what shall be the remedy?

2. Statement of Facts:

   The Company issued pilot Robert Konop a "Statement of Charges" on March 31, 2005. A hearing on the Company's charges was held on April 12, 2005. The Company issued its

written letter of termination on April 20, 2005. (Exhibit 1). The disposition of this matter is unsatisfactory and it is herewith submitted to this board for final hearing and determination.

3. Position of the Association:

   It is the position of the Association that the Company is in violation of the Agreement as herein alleged.

4. Position of the Company:

   It is presumed that the position of the Company is as set forth in its decision attached hereto (Exhibit 1). If such is not the position of the Company, it is requested to submit its position to the Board in writing upon receipt of a copy of this Letter of Submission.

WHEREFORE, the grievant requests the Board to decide:

a. That the Company be ordered to reinstate Captain Robert Konop to his previous position and capacity and make him whole by awarding him full back pay and benefits for the entire duration of said termination;

b. That the Company be ordered to remove the "Statement of Charges" and all references from the pilot's personnel record; and

c. That the Association have such other, further or different relief as has been requested in the

grievance or as this Board may be deem just and proper.

It is respectfully requested that the Board hear this grievance at its next regular or special session.

Sincerely,

s/Duace E. Woerth rc

Duane E. Woerth
President
Air Line Pilots Association International

cc: Robert Konop
HAL MEC Chairman
HAL MEC Grievance Chairman
ALPA SFO/CA

National Academy of Arbitrators
Tribunal Appeals Committee

In re Appeal by:
ROBERT C. KONOP Complainant
against
JAMES F. SCEARCE Charged Member

Background Facts, Analysis and Decision

On September 1, 2008, Robert C. Konop submitted a complaint to the Committee on Professional Responsibility and Grievances (CPRG), alleging that James F. Scearce, a member of the Academy, had violated the Code of Professional Responsibility for Arbitrators of Labor Management Disputes (Code). At the request of Shyam Das, Chair of the CPRG, Robert Landau, a member of the CPRG, conducted a preliminary investigation of the charges set forth in the complaint. After following the procedures outlined in Article IV, Section 2 (d) of the Bylaws, Chair Das prepared a report, setting forth a summary of the relevant facts and holding that there was cause to proceed on the charges alleging violation of Sections 6-0-1 and 6-D-2 of the Code. Chair Das

appointed Dennis R. Nolan, to serve as Hearing Officer (H.O.) to proceed as provided in Article IV, Section 2 (e) of the Bylaws.

Background Facts

In the proceeding before H.O. Nolan, the parties did not disagree with any of the facts, as set forth in the summary prepared by Chair Das. Those facts are as follows:

> "Mr. Scearce served as the neutral member of a three-member arbitration panel (System Board of Adjustment) in a grievance arising from the termination of Mr. Konop, an airline pilot, by Hawaiian Airlines (Hawaiian) in April 2005. Mr. Konop was represented by the Air Line Pilots Association (ALPA).
>
> * * *

Mr. Konop prepared an appeal of the decision of H.O. Nolan to the Tribunal Appeals Committee (Committee), dated March 9, 2009, pursuant to the provisions of Article IV, Section 2 (f) of the Bylaws. The Chair of the Committee received a copy of the appeal on March 12, 2009. The other two members of the Committee received their copies shortly thereafter.

Based on our reading of the record and appeal, which set forth Mr. Konop's arguments in some

detail, the members of the Committee were of the view that the appeal in this case could be decided on the basis of written arguments. The Chair of the Committee advised Mr. Konop and Mr. Scearce of that fact, and set forth a suggested schedule and procedure for filing written arguments. Both parties accepted the Committee's proposal.

* * *

Analysis and Decision

In his appeal, Mr. Konop argues that H.O. Nolan failed to take into account the "egregious nature" of Mr. Scearce's ethical breaches, and the "corruption of the arbitration process" that resulted. It is Mr. Konop's view that H.O. Nolan erred when he concluded that Mr. Scearce's conduct called for a penalty that involved correction rather than condemnation or punishment and issued a remedy consisting of "formal advice."

In arguing that Mr. Scearce's conduct was egregious, Mr. Konop cites a number of matters having to do with his dissatisfaction with the arbitration proceeding that were not included in the "cause" finding made by Chair Das. We do not wish to minimize the significance of the violations that occurred in this case. We agree with H.O. Nolan that Mr. Scearce's violations were "serious and inexcusable." However, they need to be viewed for what they were, and in light of the "conflicting

factors" referred to by H.O. Nolan.

As he put it in his latest submission, Mr. Scearce apparently viewed the request for clarification as "a System Board matter." He wrongly concluded that he was being asked to clarify the intent of the award so the company could share it with the court, and that the other party to the proceeding before the System Board (ALPA) apparently agreed or at least did not object to that request, as evidenced by the lack of response. Those conclusions demonstrated a woeful lack of knowledge of the provisions of the Code and appreciation of the due process reasons for their inclusion in the Code. Further, they do nothing to excuse his decision to sign the proposed clarification and send it to counsel for the company alone. His failure to obtain the views of both parties and the other two System Board members before acting was an inexcusable violation of fundamental fairness.

On the other hand, there is no showing that Mr. Scearce's erroneous conclusions and careless conduct amounted to "corruption of the arbitration process." More to the point, they did not amount to intentional misconduct of the type that would justify suspension or expulsion of an arbitrator with no record of any prior code violations.

We do differ with one of the conclusions of H.O. Nolan - his conclusion that censure was not appropriate in this case. The violations in this case

were, as H.G. Nolan himself found, "serious and inexcusable." They not only demonstrated a lack of awareness of the requirements of the Code, but insensitivity to the requirements of ordinary due process. We believe that his conduct calls for a "wake up call," forcefully reminding him of his need to be aware of the provisions of the Code and the reasons underlying their inclusion in the Code.

For these reasons, we hold that the appropriate discipline for Mr. Scearce's conduct is to censure him for his serious and inexcusable violations of Sections 6-0-1 and 6-0-2 of the Code.

s/ George R. Fleischli	3/31/09
George R. Fleischli, Chair	Date
s/ Theodore J. St. Antoine	4/2/09
Theodore J. St. Antoine	Date
s/ Walter J. Gershenfeld	4/5/09
Walter J. Gershenfeld	Date

Proceedings of the National Academy of Arbitrators; Arbitration 1989; BNA Books, 1990. [Footnotes Omitted]

* * *

Chapter 3

Arbitral Discretion The Tests of Just Cause

I.

John E. Dunsford

* * *

The Seven Tests

Perhaps the most widely known attempt to reduce just cause to precise criteria is the checklist of seven tests devised by the late Carroll R. Daugherty, a member of this Academy and a professor of labor economics and labor relations at Northwestern University. The tests were first published by him in the early 1960s as an appendage to an arbitration opinion, and were given their final formulation in another case in 1972.

* * *

Inasmuch as the company investigation serves the purpose of giving an employee his or her day in court, what is the function of the arbitrator in the

Daugherty world view? He is quite specific in his answer to that question, in his comments introducing the Seven Tests in their final formulation:

> It should be understood that, under the statement of issue as to whether an employer had just cause for discipline ... it is the employer and not the disciplined employee who is "on trial" before the arbitrator. The arbitrator's hearing is an appeals proceeding designed to learn . . . whether the employer, as sort of trial court, had conducted, before making his decision, a full and fair inquiry into the employee's alleged "crime"; whether from the inquiry said trial court had obtained substantial evidence of the employee's guilt .... In short, an arbitrator "tries" the employer to discover whether the latter's own "trial" and treatment of the employee was proper. The arbitrator rarely has the means for conducting, at a time long after the alleged offense was committed, a brand new trial of the employee.

* * *

It comes as a surprise, then, to learn that the Department of Education and Training of the American Arbitration Association (AAA) includes the Seven Tests in its Discipline Workshop Manual for

the education of new advocates and arbitrators. While it is true that a full statement of Daugherty's philosophy of arbitration is not included in the AAA Manual, the tests as reported there still convey the following propositions:

1. If there is a "no" answer to any of the seven questions, normally there is no cause for discipline.
2. Arbitrators are entitled to substitute their judgment for management's only if there is an abuse of managerial discretion.
3. A full and fair investigation must normally be made before a disciplinary decision is made, since the subsequent use of the grievance procedure will not suffice to give the employee his "day in court."
4. At the investigation the "judge" for the company must obtain substantial evidence that the employee is guilty.

* * *

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

   Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium

of typed sheets or booklets of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial [sic] reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note 1: Because considerable thought and judgment have usually been given to the development and promulgation of written

company rules, the rules must almost always be held reasonable in terms of the employer's business needs and usually in terms of the employee's performance capacities. But managerial orders often given on the spur of the moment, may be another matter. They may be reasonable in terms of the company's business needs, at least in the short run, but unreasonable in terms of the employee's capacity to obey. Example: A foreman orders an employee to operate a high-speed band saw known to be unsafe and dangerous.

Note 2: If an employee believes that a company rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, *before* administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This Question (and No. 4) constitutes the employee's "day in court" principle. An employee has the right to know with

reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made *before* its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge,' but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached

management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly just as an actual third party would.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

Note 5: At his hearing the management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

5. At the investigation did the company "judge" obtain substantial and compelling evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be fully conclusive or "beyond all reasonable doubt." But the evidence must be truly weighty and substantial and not flimsy or superficial.

Note 2: When the testimony of opposing witnesses at the arbitration appeals hearing is irreconcilably in conflict, an arbitrator seldom

has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people instead of that given by the accused employee and his witnesses. Such grounds may include a decision as to which side had the weightier reasons for falsification.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

   Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

   Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

   Note 3: For an arbitral finding of discrimination against a particular grievant to be justified, he and other employees found guilty of the same offense must have been in reasonably comparable circumstances.

   Note 4: The comparability standard considers three main items— the degree of seriousness in the offense, the nature of the employees' employment records, and the kind of offense,

(a) Many industrial offenses, e.g., in-plant drinking and insubordination, are found in varying degree. Thus, taking a single nip of gin from some other employee's bottle inside the plant is not so serious an offense as bringing in the bottle and repeatedly tippling from it in the locker room. Again, making a small, snide remark to and against a foreman is considerably less offensive than cussing him out with foul language, followed by a fist in the face, (b) Even if two or more employees have been found guilty of identical degrees of a particular offense, the employer may properly impose different degrees of discipline on them, provided their records have been significantly different. The man having a poor record in terms of previous discipline for a given offense may rightly, i.e., without true discrimination, be given a considerably heavier punishment than the man whose record has been relatively unblemished in respect to the same kind of violation, (c) The words "same kind of violation," just above, have importance. It is difficult to find discrimination between two employees found guilty of totally different sorts (not degrees) of offenses. For example, poor work performance or failure to call in absences have little comparability with insubordination or theft.

7. Was the degree of discipline administered by the company in a particular case reasonably related to

(a) the seriousness of the employee's proven offense and (b) the record of service with the company?

Note 1: A trivial proven offense as such does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," and "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm "Yes' answers to all the first six questions. Suppose further that

the proven offense of the accused employee was a very serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though the arbitrator, if he had been the original "trial judge," might have imposed a lesser penalty. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.